1848

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 197.

THE UNITED STATES, APPELLANT,

vs.

RICHARD JONES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 21, 1903.

(18792.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 197.

THE UNITED STATES, APPELLANT,

vs.

RICHARD JONES.

APPEAL FROM THE COURT OF CLAIMS.

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27646—03



1 Court of Claims.

RICHARD JONES
vs.
THE UNITED STATES. } No. 21434.

I. *Petition.*

The claimant filed his original petition on the 26th day of July, 1899. Subsequently, to wit, on the 14th day of December, 1899, in lieu of said original petition and by leave of court the claimant filed his amended petition, as follows:

2 RICHARD JONES
v.
UNITED STATES. } No. 21434.

Amended petition. Filed December 14, 1899.

To the honorable the Court of Claims:

The claimant, Richard Jones, respectfully represents:

From April 4, 1893, to February 7, 1899, the claimant was and is now clerk of the United States courts for the southern district of Alabama.

During that time the claimant, as such clerk, performed services in behalf of the United States, and his accounts therefor, verified by his oath, were submitted by the United States district attorney to the court for approval on the 25th day of March, in the year 1899. The court, on the same day, approved the same as being just and in accordance with law, and the orders of approval were duly entered of record. Said accounts so approved were presented for allowance and payment to the accounting officers of the Treasury, who allowed and paid part thereof, but disallowed the sum of two hundred and eighty-three dollars ($283), the items of which are as follows:

In Treasury statement No. 55859:

Fees for noting in the record of the list of names in the jury box the date when and name of each person drawn and serving as grand and petty jurors was drawn in accordance with Rule 20 of the court, the noting in said record of each name drawn being a separate and distinct entry and the same being charged, 1,030 entries at 15c. each $154.50

3 Entering in the judgment record book judgments in United States cases in favor of the United States, the same being charged at 15c. each. $25.80

Making entries in the separate cash book furnished and directed to be used by the Attorney-General as a record of fees and expenses of United States marshals, paid and on deposit by the clerk, as required by § 6 of the act of May 28, 1896 (2 Supp. R. S., 479), at 15c. each..... $1.65

Filing certificates of deposit for funds deposited with the assistant treasurer of the United States at New Orleans and the collector of internal revenue at Birmingham, Alabama, said certificates of deposit being filed, with accounts rendered to the court, by the claimant, under § 798 of the Revised Statutes, at 10 cents for each certificate filed.....	$7.10	
Certificates to pay rolls of jurors and witnesses of marshals' accounts, at 15c. each certificate.....	.30	
Total contained in account 55869.....		$189.35
In Treasury statement No. 55870:		
Fees for administering oaths and affixing jurats to the accounts of United States marshals of said district and their deputies, to bailiffs, and to the crier of the court, said account being rendered in original and duplicate, as required, and the charge for said oaths and jurats being, for one oath, 10c.; two jurats, one to the original and one to the duplicate account, each 15c., total 40c., and aggregating.....		$60.80
In Treasury statement 55871:		
Fees for administering oaths and affixing jurats, as stated in the last preceding item, at 40c. in each case.....	$30.40	
Entries in the separate cash book furnished and required to be used by the Attorney-General as a record of fees and expenses of United States marshals, paid to and deposited by the clerk, as required by § 6 of the act of May 28, 1896, at 15c. for each entry.....	.15	
Filing certificates of deposit for funds deposited with the assistant treasurer at New Orleans and the collector of internal revenue at Birmingham, Alabama, said certificates being filed, with the accounts rendered to the court, under § 798 of the Revised Statutes, at 10c. for each certificate filed	2.30	
Total.....		32.85
The last account is as clerk of the circuit court, the two former ones being as clerk of the district court.		
Total.....		$283.00

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided,

abetted, or given encouragement to rebellion against the said Government, and the claimant believes the facts as stated in this petition to be true. And the claimant claims two hundred and eighty-three dollars ($283).

GEORGE A. KING,
Attorney for Claimant.

SOUTHERN DISTRICT, STATE OF ALABAMA,
City and County of Mobile, ss:

Richard Jones, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

RICHD. JONES.

Subscribed and sworn to before me this 29th day of November, A. D. 1899.

[SEAL.] W. D. MCKINSTRY,
U. S. Commissioner.

II. *Traverse. Filed January 21, 1902.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

6 III. *Findings of fact and conclusion of law. Filed as of January 27, 1902.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, Richard Jones, was at the several times of the rendition of the services hereinafter set forth, clerk of the circuit and district courts of the United States for the southern district of Alabama.

As such clerk he rendered services for the United States, for which he rendered accounts to one of said courts, and said accounts were thereupon approved by such court as being in accordance with law and just. Subsequently said accounts were transmitted, with the order of approval, to the accounting officers of the Treasury, by whom several items hereinafter stated were disallowed.

II.

Item 1. Entries on original list of names drawn from jury box. $138.60
Item 2. Entering judgments in favor of the United States in judgment record book 25.80

Item 3.	Entries in cash book	$1.80
Item 4.	Filing certificates of deposit.....	9.40
Item 5.	Certificates to pay rolls of jurors and witnesses.....	.30
Item 6.	Administering oaths and affixing jurats to accounts of United States marshals, at ten cents for each oath and fifteen cents for each jurat.....	91.20

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States on Items 2, 3, 4, 5, and 6 of Finding II, in the sum of one hundred and twenty-eight dollars and fifty cents ($128.50).

Item 1 of said finding is disallowed.

BY THE COURT.

7 IV. *Judgment of the court.*

RICHARD JONES
v.
UNITED STATES. } No. 21434.

At a Court of Claims, held in the city of Washington on the 27th day of January, 1902, judgment was ordered to be entered in the above-entitled case as follows:

The court, on due consideration of the premises, find for the claimant and do order, adjudge, and decree that the said claimant, Richard Jones, do have and recover of and from the United States the sum of one hundred and twenty-eight dollars and fifty cents.

$128.50. BY THE COURT.

8 V. *Motion for new trial filed by defendants April 2, 1902, and order overruling same.*

Now comes the defendants, by their Attorney-General, and move the court to vacate the judgment and grant a new trial in this case on the ground of error of law, in the judgment of the court, in this: That the court rendered judgment for the claimant on item 6 of finding 2, whereas, in law, judgment should have been rendered for the defendants on said item.

L. A. PRADT,
Asst. Attorney-General.
PHILIP M. ASHFORD,
Asst. Attorney.

Ordered, That the defendants' motion for new trial be overruled and that the findings of fact heretofore, on the 27th day of January, 1902, be withdrawn and new findings this day filed, nunc pro tunc, in lieu thereof.

BY THE COURT.

Filed June 2, 1902.

9 VI. *Motion of claimant for new trial. Filed April 19, 1902; and order overruling same.*

The claimant hereby moves for a new trial, and as a ground thereof, assigns that the court erred in law in disallowing by its judgment item 1. "Entries in jury record of names drawn from jury box $138.50."

This motion is made as a cross-motion to that of the United States.

GEORGE A. KING,
Attorney for Claimant.

Ordered, That the claimant's motion for a new trial be overruled and that the findings of fact heretofore filed on the 27th day of January, 1902, be withdrawn, and new findings this day filed, nunc pro tunc, in lieu thereof.

BY THE COURT.

Filed June 2, 1902.

10 *Application for and allowance of appeal.*

RICHARD JONES
v.
THE UNITED STATES. } No. 21434.

From the judgment rendered in the above-entitled cause on the 27th day of January, 1902, in favor of the claimant, the defendants, by their Attorney-General, on the 2nd day of April, 1902, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed April 2, 1902.

JANUARY 13, 1903.

At a Court of Claims held January 13th, 1903, it was ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

11 Court of Claims.

RICHARD JONES
vs.
THE UNITED STATES. } No. 21434.

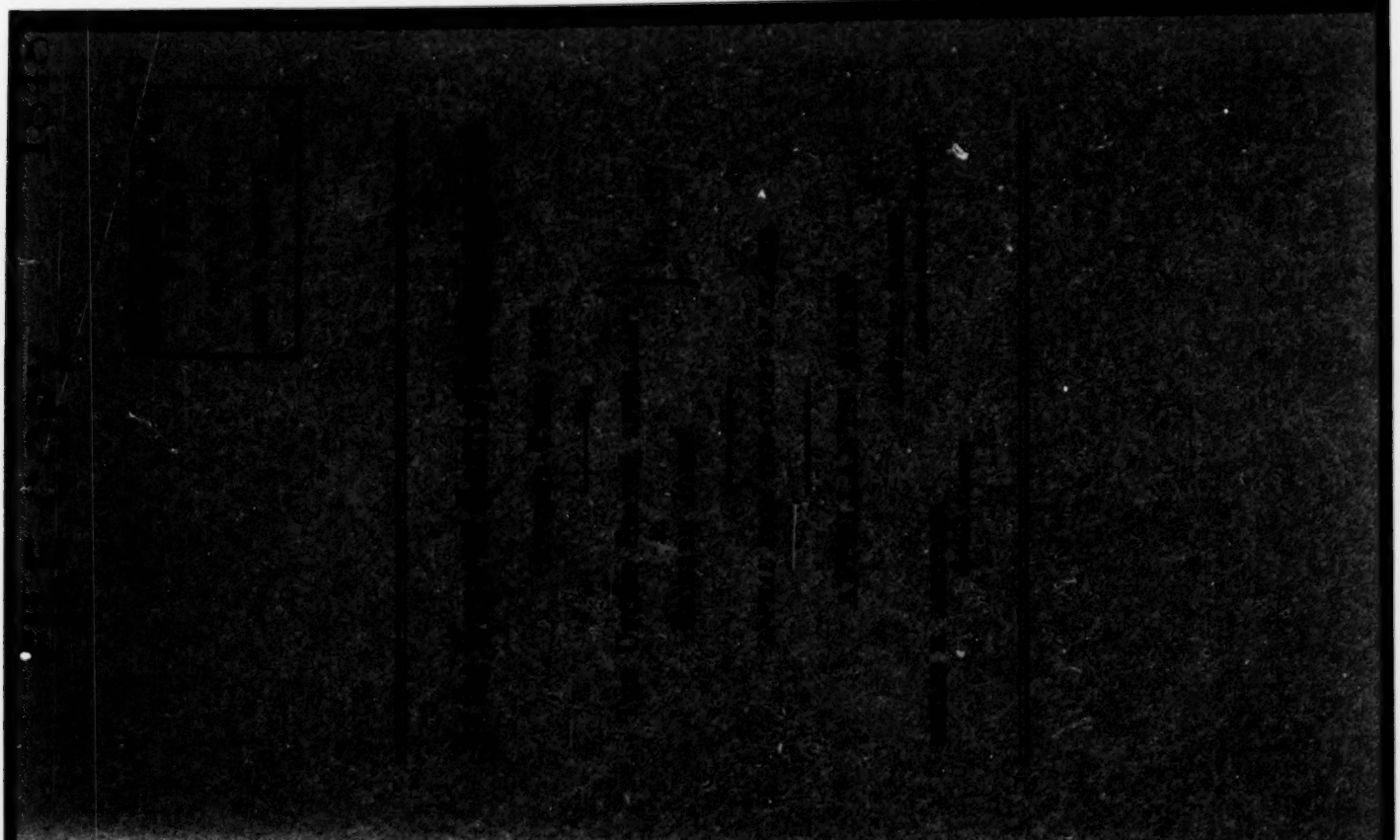
I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, and of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 19 day of January, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

12 (Indorsement on cover:) File No. 18792, Court of Claims. Term No. 197. The United States, appellant, *vs.* Richard Jones. Filed January 21st, 1903.



18490

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
RICHARD JONES.
No. 197.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF CASE.

The claimant below was clerk of the United States courts for the southern district of Alabama, during the time the services claimed for in this suit were performed. As such officer, he was authorized to administer oaths, and did, as a matter of fact, administer oaths to the United States marshal for said district on his accounts rendered in pursuance of the act of February 22, 1875 (18 Stat. L., 333). For said service he charged the United States for each oath 10 cents, and for each jurat 15 cents, amounting in all to $91.20 (item 6, Finding II, transcript, p. 4). Said charges, along with others, were disallowed by the accounting officers of the Treasury Department.

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On suit brought for said disallowances by the appellee, the Court of Claims rendered judgment in favor of the appellee for said item of $91.20, charged for services as above indicated.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the appellant on the sixth item of the second finding of fact (transcript, p. 4).

ARGUMENT.

Clerks, marshals, and district attorneys are required by the act of February 22, 1875 (18 Stat. L., 333), to present their accounts, duly sworn to, for approval. The said accounts are sworn to by the officer presenting the same, or by the person having knowledge of the facts, and the oaths are attached to the accounts. It is our contention that the making of the oath and attaching the same to the account is a part of the formality of presenting such accounts. No account of such officer is complete without the oath required by said act attached thereto. It is not ready for presentation to the court. The account can not be said to be "rendered" unless it has attached thereto the required oath, and of course the oath can not be attached to the account until the officer or other person having knowledge of the facts has been sworn. If we are correct in this contention, it follows that the expense incident to taking the required oath and attaching the same to the

account must be borne by the creditor—in this case the United States marshal.

This precise question has never been decided by this court. However, in the analogous case of *Van Duzee* (140 U. S., 169, paragraphs 2 and 3), the principle for which we here contend was enunciated. Mr. Justice Brown, speaking for the court, said:

> The charges for filing the oaths, bonds, and appointments of deputy marshals, jury commissioners, bailiffs, district attorneys and their assistants, are properly made against the Government and should be allowed; and where, by order of the court or custom of the office, it is the practice to require such documents to be recorded or entered upon the journal, the clerk's fees for such services are also properly chargeable. But the expense of taking the oaths and executing the proper bonds is not so chargeable, since it is the duty of persons receiving appointments from the Government to prepare and tender to the proper officer the oaths and bonds required by law; in other words, to qualify themselves for the office. What shall be done with such qualifying papers does not concern them; their own duty is discharged by the tender of such papers properly executed according to law.
>
> The same principle applies to the charges for approving the accounts of these officers. By the act of February 22, 1875 (18 Stat., 333, c. 95), "before any bill of costs shall

be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney, or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. *It follows from this section that the officer has performed his duty by "rendering" his account in proper form to the court, with the proper affidavit or oath in support of the actual and necessary performance of the services therein charged.* He is not concerned with the method of verification adopted by the Government for

> its own convenience and protection, and is no more liable for the expense of entering the orders of approval of such accounts, or for the certified copies of such orders, than he is for the expense of auditing such accounts at the Treasury Department. The statute imposes upon the court to a certain extent the duties of an auditing officer, but such duties are imposed not for the benefit of the claimant, who is entitled to his statutory compensation for the services rendered, but for the protection of the Government, and the expenses attendant thereon are proper charges against the Government.

That part of the opinion above quoted in italics is specially applicable to the question at issue in the case at bar, and when taken in connection with the decision of the court in the case of *Jones* (147 U. S., 672, Item One), seems conclusive of our contention.

Mr. Justice Brown, speaking for the court in that case, also, said:

> Charges for entering orders approving marshal's accounts were allowed in the case of *United States* v. *Van Duzee* (140 U. S., 169, 171), and we have seen no reason to change the opinion there expressed. The labor of preparing one's own account for services or fees is a mere incident to the rendition of the service, and is universally assumed by the creditor as his own burden.

In the case of *Allred* v. *United States* (155 U. S., 591, 596) Mr. Justice Brown, in delivering the

opinion of the court, referred to the case of Van Duzee, above cited, and said:

> We held that where there was an express act of Congress requiring clerks, marshals, and district attorneys to render their accounts to the court, and to prove in open court by oath to be attached to such account that the services had been actually and necessarily performed, such officer had performed his duty by rendering his account in proper form to the court, with proper affidavit or oath, and was not further concerned with the method of verification adopted by the Government for its own convenience, and was not liable for the expense of entering the order of approval of such accounts.

The inference to be drawn from this language applicable to this case is that the expense of rendering the account in proper form, with the proper affidavit or oath attached thereto, must be borne by the officer. The decisions above cited, it seems to us, leave no room for doubt upon this question.

Judge Baker, of the district court for the district of Indiana, in the case of *Butler* v. *United States* (87 Fed. Rep., 655, 668), seems to have reached a different conclusion as to the purport and effect of the decisions above cited. He holds that the clerk is entitled to charge the United States for services rendered in administering the required oath to marshals on their accounts, and cites in support of his decision the identical cases from which we

have quoted above. It seems to us, however, that the opinion in the Butler case is based upon the false premise that the taking and attaching to the account of an oath that the services and expenses therein charged had been actually and necessarily performed or incurred was not a part of the rendition of the account in proper form as required by the act of February 22, 1875. The learned judge said:

> An account is "rendered" when it is presented. Rendering an account and proving an account are separate and distinct under the statute. The former does not include the latter.

Evidently it was intended in using the words "proving an account" to refer to the oath taken by the officer presenting the same, which was attached to the account. We think it is shown clearly by the decisions of this court, above cited, that this was a mistaken assumption. The oath is required by express act of Congress, and the officer has not done his duty with respect to "rendering" his accounts unless he has sworn to the same and had the oath attached thereto.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

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APPELLEE'S BRIEF

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 19 1904
JAMES H. MCKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 167.

THE UNITED STATES, Appellant,

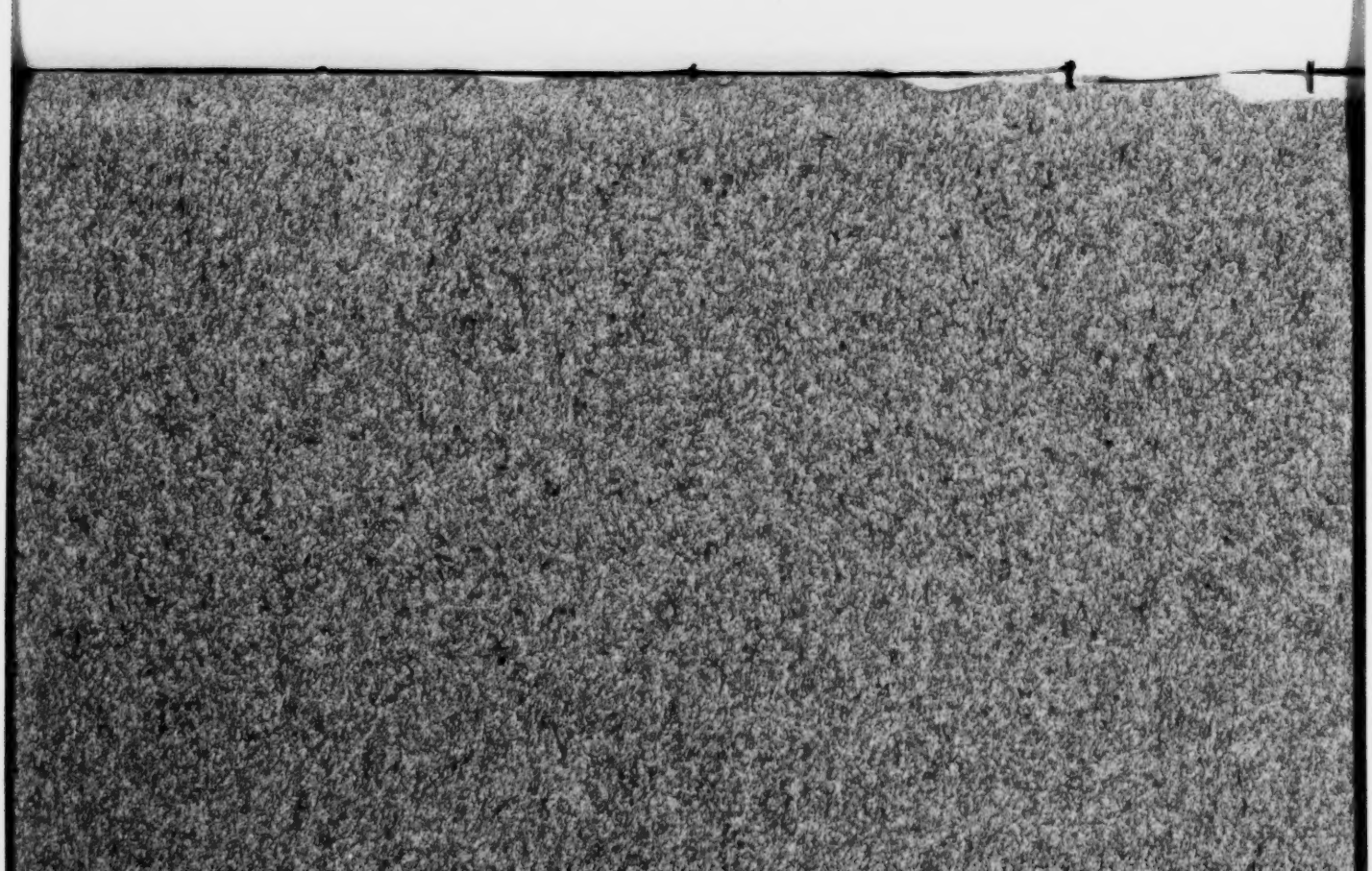
v.

RICHARD JONES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

GEORGE A. KING,
Attorney for Appellee.



18495

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, *Appellant*,
v.
RICHARD JONES. } No. 197.

BRIEF FOR APPELLEE.

I. Statement of the Case.

The claimant and appellee, Richard Jones, brought suit in the Court of Claims for services of different kinds performed by him as clerk of the Circuit and District Courts of the United States for the Southern District of Alabama. The Court of Claims rendered the following findings of fact and conclusion of law (Record, pp. 3, 4):

"I. The claimant, Richard Jones, was at the several times of the rendition of the services hereinafter set forth, clerk of the circuit and district courts of the United States for the southern district of Alabama.

"As such clerk he rendered services for the United States, for which he rendered accounts to one of said courts, and said accounts were thereupon approved by such court as being in accordance with law and just. Subsequently said accounts were transmitted, with the order of approval, to the accounting officers of the Treasury, by whom several items hereinafter stated were disallowed.

"II. Item 1. Entries on original list of names drawn from jury box $138.60
Item 2. Entering judgments in favor of the United States in judgment record book 25.80
Item 3. Entries in cash book 1.80
Item 4. Filing certificates of deposit . . 9.40
Item 5. Certificates to pay rolls of jurors and witnesses 30
Item 6. Administering oaths and affixing jurats to accounts of United States marshals, at ten cents for each oath and fifteen cents for each jurat 91.20

"CONCLUSION OF LAW. Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States on Items 2, 3, 4, 5, and 6 of Finding II, in the sum of one hundred and twenty-eight dollars and fifty cents ($128.50).

"Item 1 of said findings is disallowed."

The United States appealed from the judgment, and assigns as error the allowance of the 6th item above.

II. Brief of Argument.

The question in this case, briefly stated, is whether a clerk of court is entitled to be paid by the United States for administering oaths and affixing jurats to the accounts of United States marshals and their deputies.

The question is in principle covered by the decision of this court in *United States* v. *Allred* (155 U. S. 591, 596):

"2. This ruling covers all but the 9th item, 'for administering oaths to deputy marshals to verify their accounts of service, as required by the Attorney-General, and the accounting officers of the Treasury.'

"In the case of *United States* v. *McDermott*, 140 U. S. 151, we held a commissioner and chief supervisor of elections to be entitled to fees for drawing affidavits of super-

visors as to the actual performance of the services for which compensation was claimed by them, and for administering the oath and drawing the jurat to such affidavits, upon the ground that the Attorney-General required these affidavits for the protection of the government, and that it was no more than right and just that it should pay for them. So also in *United States* v. *Van Duzee* (140 U. S. 169, 171, item 3), we held that where there was an express act of Congress requiring clerks, marshals, and district attorneys to render their accounts to the court, and to prove in open court by oath, to be attached to such account, that the service had been actually and necessarily performed, such officer had performed his duty by rendering his account in proper form to the court with proper affidavit or oath, and was not further concerned with the method of verification adopted by the government for its own convenience, and was not liable for the expense of entering the orders of approval of such accounts.

"As the regulations of the Department of Justice require deputy marshals to certify on oath that the accounts rendered to the marshal are correct, we think this case is controlled by those above cited, and that the court committed no error in allowing the item.

"The judgment of the court below is, therefore, affirmed."

This decision was followed by Judge Baker in the District Court for the District of Indiana in *Butler* v. *United States* (87 Fed. Rep. 655; cited with approval on another point in *United States* v. *Finnell*, 185 U. S. 236, 243); the grounds of the decision being thus stated (pp. 667, 668):

"The fees which are claimed for affidavits to the marshal's accounts were taxed and charged against the government under the act of Congress approved February 22, 1875 (18 Stat. 333), as interpreted by the supreme court in *United States* v. *Van Duzee*, 140 U. S. 169, 171 (item 3), 11 Sup. Ct. 758. Under that statute, a marshal is required to 'render' his accounts to the court, and to

'prove' them by his own affidavit. An account is 'rendered' when it is presented. Rendering an account, and proving an account, are separate and distinct transactions, under the statute. The former does not include the latter. The account is rendered for the benefit of the marshal. It is proved for the 'convenience and protection of the government,' and 'the expenses attendant thereon are proper charges against the government.' Such is the language of the supreme court, and the principle of the decision is plain. Whatever is done for the benefit of the marshal is chargeable against himself. Whatever is done for the 'convenience and protection' of the government is chargeable against itself. No charge by the clerk for affidavits was under consideration in this case. But in the case of *United States* v. *Allred*, 155 U. S. 591, 15 Sup. Ct. 231, where a charge for affidavits by deputy marshals to their accounts was under consideration, the supreme court held, in accordance with the principle of its decision in *United States* v. *Van Duzee, supra*, that the fees for these affidavits should be paid by the government. It is perfectly clear that, if the fees for affidavits by deputy marshals to their accounts are chargeable against the government, the fees for affidavits by marshals to their accounts must also be chargeable against the government, on the principle of the *Van Duzee* Case. Nevertheless, the accounting officers have invented a novel distinction between these two classes of affidavits, namely: Where an affidavit to an account is required, for the convenience and protection of the government, by an act of congress, it is not chargeable against the government; but where an affidavit to an account is required, for the convenience and protection of the government, by the attorney-general or the accounting officers, it is chargeable against the government. Marsh's Case, 2 Dec. Comp. 482.

"In *United States* v. *Jones*, 147 U. S. 672, 673 (item 1), 13 Sup. Ct. 437, the supreme court placed its own construction on its decision in *United States* v. *Van Duzee, supra*, as follows:

"'The labor of preparing one's own accounts for services or fees is a mere incident to the rendition of the

service, and is universally assumed by the creditor as his own burden; but the approval of the account of another stands upon a different footing, and if performed at the request of the government, or under a statute requiring it to be performed for the protection of the government, there is no reason why the clerk should not receive such fees therefor as he receives for analogous services in other matters.'

"These considerations, in the opinion of the court, justify and require the allowance of fees in question. So ordered."

The question was presented in a somewhat different form in *Puleston* v. *United States* (85 Fed. Rep. 570), where the marshal paid the clerk for these oaths and jurats. It was held that as the marshal is now a salaried officer, it is intended that he shall receive the net salary free of all expense, establishing his right to a credit for disbursement. This decision was affirmed on appeal by the Circuit Court of Appeals (106 Fed. Rep. 294).

Similar items were allowed in *Marsh* v. *United States* (88 Fed. Rep. 879; item 24, pp. 886, 887; items 27, etc. foot of p. 887; items 41, etc. pp. 888, 889; items 54, etc. p. 889). Subsequent decisions in the same case (106 Fed. Rep. 474; 109 Fed. Rep. 236; 112 Fed. Rep. 929) do not overrule the allowance of these items.

These authorities fully sustain the action of the Court of Claims in the allowance of this item.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
Attorney for Appellee.

CLERK'S OFFICE 18500

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 198.

THE UNITED STATES, APPELLANT,

vs.

CHARLES H. GILDERSLEEVE.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 21, 1903.

(18793.)

18501

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 198.

THE UNITED STATES, APPELLANT,

vs.

CHARLES H. GILDERSLEEVE.

APPEAL FROM THE COURT OF CLAIMS.

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18502

1 In the Court of Claims.

CHARLES H. GILDERSLEEVE
v.
THE UNITED STATES. } No. 21752.

I. Petition. Filed March 6, 1900.

To the honorable the Court of Claims:

The claimant, Charles H. Gildersleeve, respectfully represents:

1. That he was from January 1st, 1897, to March 31, 1898, clerk of the United States district court for the first district of New Mexico, and during said period became entitled to certain fees from the United States for services rendered as such clerk.

2. That he presented his accounts for said services, as required by law, through the district attorney to the judge of the United States district court in said first district of New Mexico, and said accounts were, so far as included herein, duly approved by the court and were then by the claimant presented for payment to the Auditor for the State and other Departments in the Department of the Treasury.

3. That allowances were made by the Auditor upon said accounts by certificates 44708, 44709, and 56386, and said amounts so allowed have been paid, but numerous items of said accounts have been disallowed by said Auditor, although justly due to this claimant, as will more fully appear in the table hereto attached, marked "Appendix A," and by the original items of account filed in the Treasury Department as aforesaid, to which the claimant asks leave to refer as a part of this petition.

4. That by reason of the facts aforesaid there is due to the claimant the sum of four hundred dollars and twenty cents ($400.20), for which claim is now made.

2 No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant prays judgment in the sum of four hundred dollars and twenty cents ($400.20).

GEORGE A. & WM. B. KING,
Attorneys for Claimant.

CHARLES H. GILDERSLEEVE,
Claimant.

STATE OF NEW YORK, *City and County of New York:*

CHARLES H. GILDERSLEEVE, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

CHARLES H. GILDERSLEEVE.

Subscribed and sworn to before me this first day of March, 1900.

[SEAL.] JAMES SIMMONS,
Notary Public, No. 52.

APPENDIX "A."

Items of account, certificate 44708, January 1 to June 30, 1897.

1.	Affidavits of various defendants to their poverty	$1.20
	Filing defendants' motions in same cases.....	4.00
2.	Issuing subpœnas for jurors, with seals	54.90
3.	Preparing judge's docket.....	24.60
4.	Filing oaths and affidavits of poverty.....	1.20

Items of account, certificate 44708, July 1 to December 31, 1897.

1.	Making up appeal papers on behalf of the defendants in case of United States v. Reavis, directly ordered by the court.	$259.60
2.	Issuing subpœnas for jurors and seals.....	54.90

3 *II. Traverse. Filed May 15, 1902.*

CHARLES H. GILDERSLEEVE
v.
UNITED STATES. } No. 21752.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

4 *III. Findings of fact and conclusion of law. Filed May 19, 1902.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

The claimant, Charles H. Gildersleeve, was, during the time covered by this claim, clerk of the district court of the first judicial district of the Territory of New Mexico. As such clerk he from time to time during the calendar year 1897 performed services as herein stated, and his

accounts for the same were submitted to said court in the presence of the district attorney of the United States, and the court thereupon entered an order approving the charges as being in accordance with law and just. The accounts were then forwarded to the accounting officers of the Treasury, by whom the items hereinafter specifically set forth were disallowed under decisions of the Comptroller of the Treasury.

II.

The items so disallowed were as follows:

1. Making up appeal papers on behalf of the defendant in the case of The United States v. James Addison Peralta-Reavis, indicted for conspiracy and convicted thereof in said district court upon the following affidavit and order of said court therefor:

"In the district court of the first judicial district of the Territory of New Mexico.

THE UNITED STATES OF AMERICA, plaintiff, *v.* JAMES ADDISON REAVIS, DEFENDANT. } Conspiracy. No. 1620.

James Addison Reavis, being duly sworn, on his oath says that he is the plaintiff in error in the case of James Addison Reavis v. The United States of America, in which case a writ of error has been sued out from the supreme court of the Territory of New Mexico to the district court of the first judicial district of the Territory of New Mexico; that he is informed that the fees of the clerk of said district court for making and certifying a complete record in said cause will be about $400.00; that he is entirely without means with which to pay the said clerk for such service, and that he knows of no source from which he can procure or obtain the amount or any amount of money to defray the expenses in perfecting his said appeal to the supreme court of the Territory of New Mexico; and that if he can not obtain the said transcript of said record without paying the clerk of said district court his said fees therefor he will not be able to present his said cause to the said supreme court.

(Signed) JAMES ADDISON REAVIS.

Subscribed and sworn to before me this 28th day of October, A. D. 1896.

[SEAL OF DISTRICT COURT.] GEO. L. WYLLYS,
Clerk of the District Court of the First Judicial District of the Territory of New Mexico."

5 "THE UNITED STATES *v.* JAMES ADDISON REAVIS, ALIAS JAMES ADDISON PERALTA-REAVIS, alias James Addison Peraltariaves, and Jose Miguel Noe. } Conspiracy. No. 1620.

Upon reading the affidavit of the defendant, and it being made to appear to the satisfaction of the court that the said defendant, James

Addison Reavis, is unable to provide funds for the preparation of the transcript of record of his said case for review by the supreme court of Territory of New Mexico,

It is ordered by the court that the clerk of this court prepare said transcript with all convenient speed and transmit the same, duly certified, to the clerk of the supreme court of the Territory of New Mexico.

(Signed) N. B. LAUGHLIN,
Associate Justice, etc."

(Certified copies of above papers on file.)

The particulars of said charges are as follows:

1. July 10, 1897. Filing transcript in response to writ of error from the supreme court of New Mexico	$0.20
Certificate and seal	.70
1,264 folios and seal, at 20 cents	253.80
Certificate and seal	.70
Certified order of court that clerk prepare transcript for poor debtor, 2 folios	.60
Certificate and seal	.70
Certified copy of affidavit of poor debtor, 3 folios	.90
Certificate and seal	.70
Certified copy of præcipe of attorney for defendant, 2 folios	.60
Certificate and seal	.70
	259.60

The disallowance by the accounting officers was on the ground that "Appeal papers on behalf of defendant, although ordered by the court, are not chargeable against the United States."

An additional objection was made to certificates and seals.

2. Preparing similar affidavits of various defendants to their poverty	$1.20
Filing said affidavits of poverty	1.20
Filing defendants' motions in same case	4.00
	6.40
3. Issuing 122 subpœnas for grand and petit jurors, by order of the court, at 50 cents each	$61.00
Seals on same, at 40 cents	48.80
4. Preparing the judge's docket, 41 cases, 82 folios, 30 cents each	24.60

6 CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment from the United States on items 1, 2, the item of 122 subpœnas, of item 3, of Findings II, in the sum of three hundred and twenty-seven dollars ($327).

All other items not abandoned or withdrawn are disallowed.

BY THE COURT.

IV. Judgment of the court.

CHARLES H. GILDERSLEEVE
vs.
THE UNITED STATES. } No. 21752.

At a Court of Claims held in the city of Washington on the 19th day of May, 1902, judgment was entered *is* follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said claimant, Charles H. Gildersleeve, have and recover of and from the United States the sum of three hundred and twenty-seven dollars ($327).

BY THE COURT.

7 *Motion of defendants for new trial and order overruling same.*

Now come the defendants, by their Attorney-General, and move for a new trial in this case on the grounds of error of law in this:

That judgment was rendered for the claimant on the first, second, and part of the third items of the second finding of fact, when judgment ought to have been rendered thereon for the defendants.

L. A. PRADT,
Asst. Attorney-General.
PHILIP M. ASHFORD,
Assistant Attorney.

Order.

Overruled for indefiniteness.

BY THE COURT.

JANUARY 12, 1903.

8 *IV. Application for and allowance of appeal.*

CHARLES H. GILDERSLEEVE
vs.
THE UNITED STATES. } No. 21752.

From the judgment rendered in the above-entitled cause on the 19th day of May, 1902, in favor of the claimant, the defendants, by their Attorney-General, on the 23d day of September, 1902, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed September 23, 1902.

At a Court of Claims, held January 13, 1903, it was ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

9 Court of Claims.

CHARLES H. GILDERSLEEVE
vs.
THE UNITED STATES. } No. 21752.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, and of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17 day of January, A. D. 1903.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18793. Court of Claims. Term No. 198. The United States, appellant, vs. Charles H. Gildersleeve. Filed January 21st, 1903.

FILE COPY.

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Office Supreme Court U.S.
FILED
DEC 21 1903
DAVID B. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANTS,
v.
CHARLES H. GILDERSLEEVE.
No. 196.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

LOUIS A. FRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

18506

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
v.
CHARLES H. GILDERSLEEVE. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF CASE.

Claimant below was clerk of the United States district court for the first district of New Mexico, from January 1, 1897, to March 31, 1898. During that time one James Addison Reavis was tried and convicted of the crime of conspiracy in said court. Said defendant, Reavis, sued out a writ of error from the supreme court of the Territory of New Mexico to said district court, and made affidavit before the clerk of the district court that he was wholly without means to pay for a transcript of the record. The judge of said district court ordered said clerk to prepare said transcript of record, which he did, charging his services therefor to the United States. The accounting officers of the Treasury Department disallowed said charges. Upon suit brought therefor in the Court of Claims

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judgment was rendered against the appellant for the sum of said charges. (Finding II, transcript, pp. 3 and 4.)

Said claimant below also prepared affidavits of poverty for various indigent defendants, filed the same, and filed motions for said defendants, which services he charged to the United States. The accounting officers disallowed said charges. Upon suit brought therefor in the Court of Claims, judgment was rendered against the appellant. (Finding II, transcript, p. 4, item 2.)

Said claimant also issued separate subpœnas for persons selected to serve as grand and petit jurors and attached seals thereto, which services he charged to the United States. The accounting officers disallowed said charges. Upon suit brought therefor in the Court of Claims, judgment was rendered in favor of the claimant. (Finding II, transcript, p. 4, item 3.)

ASSIGNMENT OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the appellant for the charges included in item 1, under Finding II of the findings of fact (transcript, p. 4).

2. In rendering judgment against the appellant for the charges included in item 2, under Finding II of the findings of fact (transcript, p. 4).

3. In rendering judgment against the appellant for the charges included in item 3, under Finding II of the findings of fact (transcript, p. 4).

The services included in item 1, referred to in the first assignment of error, were performed, it is claimed, in pursuance of the order of the court, found on pages 3 and 4 of the transcript. Unquestionably, it became the duty of the clerk to prepare the transcript charged for in accordance with the directions contained in said order of the court, if, indeed, it was not his duty to do so upon præcipe or proper request of the attorney for the defendant; but it is denied that the performance of this duty made the United States liable for the cost and expense of preparing and certifying said transcript of record.

The findings clearly and distinctly show that the the defendant, Reavis, was indigent. Congress, by section 878, Revised Statutes, has expressly declared what fees, costs, and expenses, incurred by indigent defendants, shall be paid by the United States. Said section provides as follows:

> Whenever any person indicted in a court of the United States makes affidavit setting forth that there are witnesses whose evidence is material to his defense; that he can not safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the

> court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. *In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in cases of witnesses subpœnaed in behalf of the United States.* (The italics are ours.)

It seems to us that this section is exclusive upon a familiar principle of statutory construction. The very fact that Congress has seen fit by express enactment to assume these particular expenses of indigent defendants indicates an intention to limit the liability of the Government so as to exclude the allowance or payment of any other costs or expenses incurred by such defendants. Instead of a statute prescribing the fees which are to be paid to the officer or officers performing the service, which is a prerequisite to payment, we have here a statute which virtually proscribes payment of any costs or expenses incurred by indigent defendants other than those named in said section. If the courts have power to determine when the costs incurred by defendants shall be paid by the United States, and to bind the United States to pay the same, by an order merely directing the performance of the service, there would have been no necessity for Congress to legislate upon this subject at all. If costs incurred by *indigent* defendants are to be paid upon order of

the court, then the act of Congress above quoted is entirely superfluous. If Congress had intended that the United States might be charged with the costs incurred by defendants who have been regularly declared indigent under any other circumstances than those named in said section, it certainly would have so declared while legislating upon the subject. In providing that only the costs incurred in procuring witnesses for indigent defendants shall be paid by the United States, Congress has, by the process of exclusion, prohibited the payment by the United States of any and all other costs incurred by said defendants. This construction of the statute may seem to work a hardship sometimes. Indeed, in this very case the appellee evidently performed very considerable services for the defendant for which there was no hope of receiving any compensation from the defendant; but courts can not obligate the United States for fees and costs which the Congress has so manifestly declared should be charged to the defendants alone—to be paid by them, if paid at all.

It does not follow, because the clerk was required by order of the court or otherwise to perform this particular service, that the United States is liable for the fees which the defendant would have to pay if he were not indigent. The United States officers may be, and often are required to perform services for which no compensation has been provided.

> Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. (*United States* v. *Shields*, 153 U. S., 88, 91; *United States* v. *Patterson*, 150 U. S., 65, 69; *United States* v. *King*, 147 U. S., 676, 679; *United States* v. *Van Duzee*, 185 U. S., 278.)

True, the Congress has provided specific fees for such services as were performed by the appellee in preparing and certifying the transcript of record in the case against Reavis. However, it is the unwritten law, and the universal practice in all courts of the United States, that the costs shall be taxed, primarily, against the party causing the service to be performed. Judgments are, of course, sometimes rendered against one or the other party for all the costs, but the clerks of the Federal courts, in taxing the costs in the first instance, uniformly charge them against the party at whose instance the service is performed. When it comes to collecting the costs so taxed, the clerk must look to the party against whom the costs are taxed. If a clerk can not collect the costs taxed against a defendant, it is his misfortune. If the defendant has not been regularly adjudged indigent, he can not look to the United States for any part of them. If he has, he can look to it only for the costs of issuing process, entering and filing returns thereon, and such other costs as are incident to procuring the attendance of witnesses for the indigent defendant.

It has been the uniform and unbroken practice of the Treasury Department for many years to disallow all charges for defendant's costs other than those enumerated in section 878. (2 Dec. Compt., 220, 221, 224, 578, and 612.)

It was claimed below, in behalf of the appellee, that this court had decided that proceedings in criminal cases are at the expense of the Govern ment. The case of *United States* v. *Van Duzee* (140 U. S., 169, 173), wherein the court said—

> We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished at the request of the defendant and at the expense of the Government, and when such order is made the clerk is entitled to his fee for the copy.

was presented as authority for said claim. An examination, however, of this case shows that the service which the court had under consideration then was not one to be performed merely for an indigent defendant, but one which the court might by order require to be performed as a matter of right to any and every person under indictment. The court could not have had in mind the matter of costs and expenses incurred by indigent defendants in rendering said decision.

The services included in item 2, referred to in the second assignment of error, were performed for indigent defendants, as the charges plainly show. They are open to the same objection urged to the charges included under item 1. Section 878

provides for the payment of the "costs incurred by the process and the fees of the witnesses" in the cases of indigent defendants. According to the plain reading of this statute, the Government's liability for the costs does not begin until the court has ordered process to be issued for defendant's witnesses under said section. This would, of course, exclude charges for preparing and filing affidavits of poverty, as well as any motions not having direct relation to the issuance of process. If the United States is liable at all for the charge for preparing and filing the affidavit, it is liable in cases where the application is refused, as well as in cases where it is granted, for it is perfectly plain that the affidavit should be filed in all cases, whether the judge orders the witness to be subpœnaed thereunder or not. It will hardly be contended that the United States should pay for these affidavits or for filing the same, in cases where the defendant's application for process is not granted by the court. (*Dundy case*, 76 Fed. Rep., 357.)

It does not appear clearly in the findings what was the nature of the motions filed in behalf of the defendants, as charged in this item, but it seems clear that there could properly be no motion made by the defendant falling within the class of fees agreed to be paid for by the United States under the provisions of said section 878.

The services charged for under item 3, referred to in the third assignment of error, are objected to because the findings of fact do not show that there

was a rule of court or that it was the practice in the Territory of New Mexico to serve persons selected as grand and petit jurors with a formal summons or subpœna. The clerk is inhibited by section 828, Revised Statutes, from making any charges for issuing the original writ of venire. In some jurisdictions the practice prevails, or a rule of court requires, that a summons consisting of a copy of the original writ be mailed to each person selected to serve as a juror. In some other jurisdictions it is the practice to have an officer serve the person so selected with a copy of the venire.

In the case of Martin, a clerk in the western district of Virginia (No. 20894, C. Cls. R.), the clerk was allowed a fee of 25 cents for each copy of venire to be served upon the persons selected as jurors, as for a summons. This charge was virtually conceded by the United States in that case on account of a rule of court. Seals to said copies, however, were disallowed in said case, as also in the case of *Martin* v. *United States* (23 C. Cls. R., 160).

In the case at bar, as has been before stated, there was no rule of court, and no fixed practice is shown to have existed upon the subject. The allowance, therefore, of any charges whatever for this service, it would seem, is without authority of law. Certainly, no allowance should be made for seals to said subpœnas. Seals are only allowed

for when required by the accounting officers, or by rule of the court. See *United States* v. *Van Duzee* (140 U. S., 169); *United States* v. *Jones* (147 U. S., 672); *United States* v. *Taylor* (147 U. S., 695); *Singleton* v. *United States* (22 C. Cls. R., 118); *Martin* v. *United States* (23 C. Cls. R., 160).

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

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Supreme Court U. S.
FILED
JAN 13 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 198.

THE UNITED STATES, Appellant,

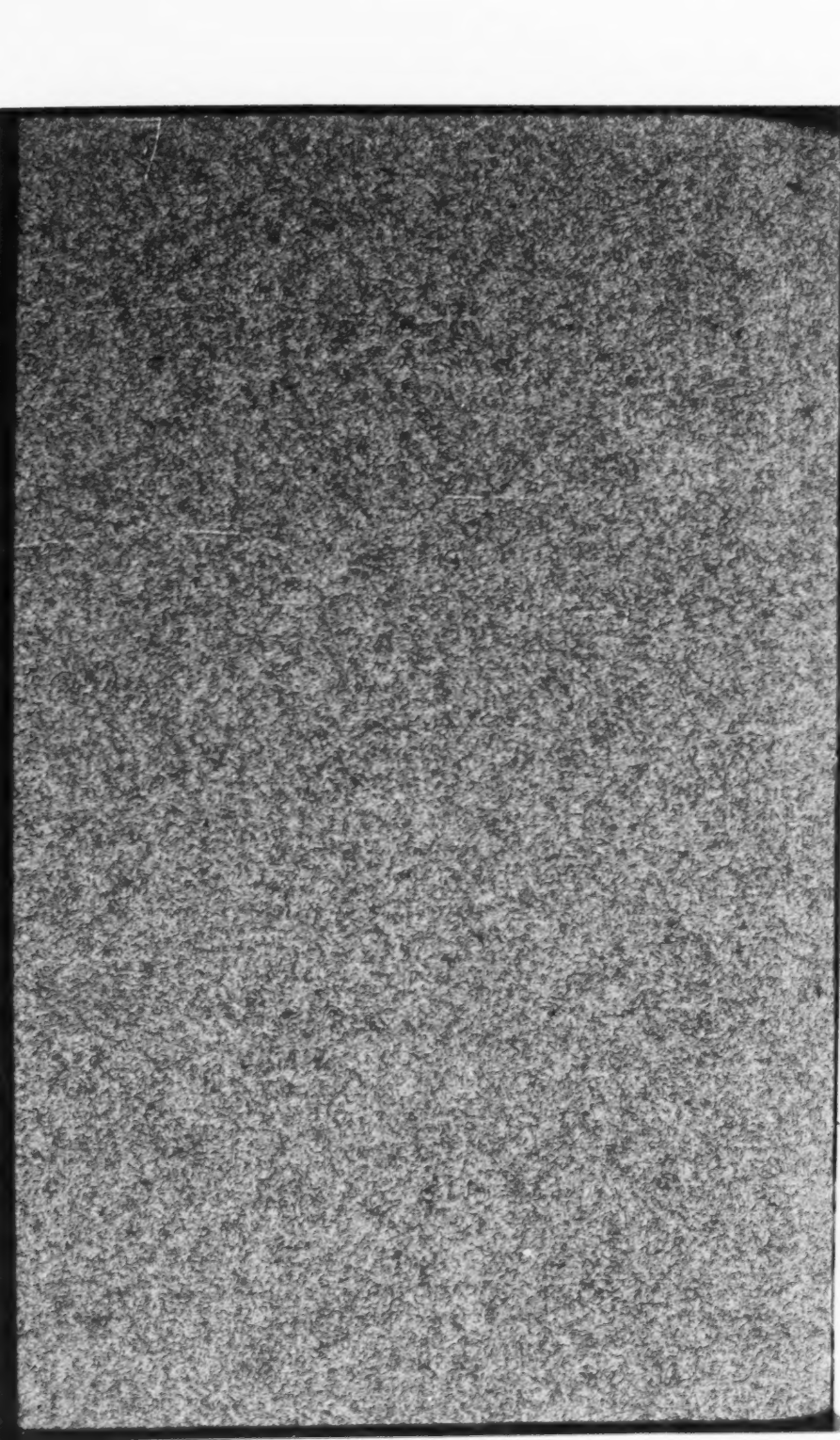
v.

CHARLES H. GILDERSLEEVE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.



18515

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, *Appellant*,
v.
CHARLES H. GILDERSLEEVE. } No. 198.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, allowing the claimant and appellee certain fees claimed by him as clerk of the District Court of the First Judicial District of the Territory of New Mexico.

The findings of the Court of Claims will be found in the record (pp. 2–4). They are correctly summarized in the appellant's brief (pp. 1, 2), except that the last paragraph of the statement of the case (p. 2) should be qualified by stating that Item 3, issuing subpœnas for jurors and attaching seals thereto, was allowed only as to the issuance of the subpœnas, and that the claim for affixing seals thereto was disallowed.

II. BRIEF OF ARGUMENT.

1. Preparing Transcript in Reavis Case.

The findings show that the service in the preparation of this transcript was performed by the claimant as clerk of the District Court of the First Judicial District of the Territory of New Mexico.

The proceeding, being in a criminal case, was properly taken at the expense of the Government.

Decisions of This Court.

The question has been in substance decided by this court in several cases.

In *United States* v. *Van Duzee* (140 U. S. 169, 173) it is said:

"There is no other statutory provision for carrying out the constitutional obligation of the government to inform the prisoner of the nature and cause of the accusation, or for summoning witnesses, or procuring the assistance of counsel, except that by § 878 indigent defendants are entitled to have their witnesses subpœnaed at the expense of the government. There is, however, no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government. We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government; and, when such order is made, the clerk is entitled to his fee for the copy."

It is also in principle sustained by what is said in *United States* v. *Barber* (140 U. S. 164, paragraphs 3, 4, pp. 166, 167) in regard to the affidavits of justification of sureties in recognizances of persons accused of crime.

Again, in *United States* v. *Allred* (155 U. S. 591, 593, 594) it said:

"1. All these items, except the ninth, relate to fees claimed to be authorized by a rule of the court requiring the service to be performed, and, therefore, allowable within the case of *United States* v. *Van Duzee*, 140 U. S.

169, 173. In that case we held, in reference to clerks' fees, that an order of the court requiring a service to be performed was sufficient authority as between the clerk and the government for the performance of the service, and for the allowance of the proper fee therefor. No question is made but that the services in question were performed in obedience to such an order."

Decisions of Inferior Federal Courts.

Several decisions of inferior Federal Courts assert the same principle.

In the case of *In re Clerk's Charges for Services Rendered in Election Cases Removed to United States Court, etc.* (5 Fed. Rep. 440), it was held that the clerk is entitled to recover from the Government his fees for services on the removal of election cases from a State to a Federal Court under Revised Statutes, Section 643, and that it was not within the option of the clerk to refuse to perform the services required by that section unless his fees for doing so were paid by the defendant petitioner for the removal of the cause.

The court said (pp. 440, 441):

"With regard to the first point, it may be observed that the clerk is the only Federal officer of court not paid in part by an annual salary from the government. His compensation is limited, and fixed by the fee bill of 1852, now Section 828, U. S. Rev. St. There is no provision to be found therein requiring the clerk to perform gratuitous services on behalf of the government, nor would it be just that he should be required to do so, unless a small annual salary were given him, as in the marshal's and district attorney's cases."

So, too, it was said in *Goodrich* v. *United States* (42 Fed. Rep. 392, 394), citing the case just quoted:

"The fees for making transcripts required by section 10 of the act approved March 3, 1887 (24 U. S. St. 507),

when ordered by the district attorney, are chargeable to the United States."

In *Butler* v. *United States* (87 Fed. Rep. 655, 666, 667) the court said, citing and following the decision of this court in *United States* v. *Van Duzee* (140 U. S. 169, 173) above quoted:

"In this case the witnesses were sworn during the progress of a trial, and in accordance with the order of the judge who was holding the court, and not upon a request which was addressed to the clerk by the defendant therein, as seems to have been assumed by the accounting officers. The witnesses were for both parties, and were sworn together; and they were witnesses in a public prosecution, instead of a civil action between private individuals, and the fees for swearing them are a part of the costs of the general administration of justice, which are payable by the government. It was not optional with the clerk to swear these witnesses or not. When a defendant applies to the clerk to make an affidavit before him, he can require his fee at the time or before the service is rendered, and, failing to do so, it is his loss. But he can not arrest the proceedings in a criminal trial until his fees for swearing witnesses are paid or secured. He can not decline to swear them because payment is refused. In many cases the witnesses for the defendant are brought into court at the expense of the government, because the defendant is unable to procure their attendance. It is the duty of the clerk to comply with the order of the court, and swear all the witnesses in accordance therewith. Their testimony is required by the court for its own information concerning the facts of a case, and not because the defendant is interested in having them sworn. And the clerk is entitled to his fees for services rendered in accordance with the order and practice of the court."

The Defense Considered.

The principal defense to this claim (Brief for Appellant, pp. 3–5) is that the provision of Revised Statutes, Sec-

tion 878, as to the fees to be paid by the United States in cases of indigent defendants is exclusive of all other costs and charges. But this court did not so construe it in *United States* v. *Van Duzee*, above quoted, nor is there any ground for regarding such as the intention of Congress. That section was originally enacted in 1846, at a time long before writs of error were generally allowed by the laws of the United States in criminal cases. Its terms can not safely be stretched to imply a prohibition against the payment of any other costs and fees, which, but for the provisions of this section, would be chargeable to the United States.

It may be presumed that the allowance of a writ of error from the Supreme Court to the District Court of the Territory is permitted by the statute because it is regarded as for the interest of public justice that the judgments of the inferior courts of the Territory shall be reviewed by the Supreme Court of the Territory. (Revised Statutes, Sec. 1869.) It is not a mere personal privilege of the defendant. It can not justly be denied to a defendant lacking means to pay for the services of the clerk of the District Court in the preparation of the transcript. Neither, on the other hand, is it just to deprive the clerk of compensation for his services. Indeed it may not unfairly be assumed that in the preparation of so voluminous a transcript as that charged for in the present case, the clerk would actually be required to expend his own money for the benefit of the Government unless the fees for the preparation of the transcript are payable by the Government. He would probably not have the time in connection with his own duties to prepare the transcript personally, and would have to employ and pay a copyist to do the work.

Both on principle and authority, therefore, this item was rightly allowed by the Court of Claims.

2. Preparing and Filing Affidavits of Poverty.

The finding of the Court of Claims, Paragraph 2, page 4, on this item, styles these "similar affidavits of various Defendants to their Poverty." These were affidavits of defendants in criminal cases to their inability from povety to pay the costs of their defense. As such, they are clearly allowable under authority cited under the previous item.

The following remarks in *Butler* v. *United States* (87 Fed. Rep. 655, 667), a part of which has been quoted under the preceding item, apply more specifically to the item now under consideration:

"The fees which are claimed for filing and entering affidavits for indigent defendants were taxed and charged against the Government, under a provision of Section 828, Rev. St., which is as follows: 'For filing and entering every declaration, plea, or other paper, ten cents.' These affidavits were filed and entered because the court ordered the clerk to file and enter them. They were presented to the court before they were filed and entered by the clerk. They would not have been filed and entered by the clerk unless the court had ordered him to file and enter them. They were filed and entered by the clerk as the foundation of the order of the court which was made upon them. The order of the court to file and enter them, and to issue subpœnas for the witnesses named therein, was a single and indivisible act. It is conceded by the accounting officers that a clerk is entitled to his fee for entering an order of the court for summoning the witnesses (Locke's Case, 2 Dec. Comp. 578), but that he is not entitled to his fee for filing and entering the affidavit on which the order is founded (Brooks' Case, *Id.* 224). He is just as much entitled to his fee for one service as the other, and he is entitled to his fee for both services on precisely the same grounds. The filing and entering of the affidavit, and the entry of the order thereon, are parts of the same transaction."

In *Goodrich* v. *United States* (42 Fed. Rep. 392, 395) the court said:

"The fee for entering order appointing attorney to defend a poor prisoner is chargeable to the United States."

3. Issuing Subpoenas For Jurors.

This item was (record, p. 4):

"3. Issuing 122 subpœnas for grand and petit jurors, by order of the court, at 50 cents each $61.00
Seals on same, at 40 cents . . . . . 48.80."

The court below allowed only the first branch of this item, amounting to $61, but disallowed the charges for seals.

The brief for the United States seems to assume (p. 9) that the court below allowed for the seals; but the conclusion of law (foot of p. 4) shows, in connection with an addition of the various items, that the charge for seals was not allowed.

The only question under this item, therefore, is whether the claimant as clerk was entitled to be paid for the subpœnas issued for grand and petit jurors.

A similar charge was sustained in *Martin* v. *United States*, (26 C. Cls. 160, not 23 C. Cls. 160 as twice stated in the brief for the United States, pp. 9, 10).

There, the court referring to the decision of this court in *United States* v. *Jones* (134 U. S. 483), said (p. 163):

"The decision of the Supreme Court relates exclusively (in the understanding of this court) to the *onus probandi*. Where the right to compensation depends upon a fact, where the only question is whether the service was rendered, or whether it was necessary, or whether it was required by the court, the approval of the account makes it evidence *prima facie*."

And with specific reference to a charge like this (pp. 166, 167):

"19. This item is for copies of subpœnas made by the clerk for service by the marshal, and for attaching to each a certificate under the seal of the court. For the former service, the copy, the fee is 20 cents; for the latter services, 35. The service of a subpœna in Virginia is by showing the witness the original and giving him a copy. The copy is but a memorandum for the convenience of the witness, telling him when and where he must appear. The authority is in the original, which, seeing, he can not question. Adding an official certificate, under seal, to the copy adds nothing to it of substance, and conveys no additional information to the witness. For 208 copies of subpœnas the claimant is entitled to recover $41.60. The remainder of the item for certificates and seals, $72.80, is overruled."

This decision covers the present case, and fully justifies the allowance of this item.

CONCLUSION.

Double charges are allowed to officers in New Mexico by the act of August 7, 1882 (22 Stat. L. 344), construed and enforced by the Court of Claims in *McGrew* v. *United States* (23 C. Cls. 273). No objection is made on behalf of the United States to the rate charged in this case, which, in accordance with the act of 1882, is twice that fixed by Revised Statutes, Section 828.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

CLERK'S OFFICE 1851

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 199.

THE UNITED STATES, APPELLANT,

vs.

MARY K. WHEELER, ADMINISTRATRIX OF STEPHEN WHEELER, DECEASED.

FILED JANUARY 21, 1903.

No. 525.

MARY K. WHEELER, ADMINISTRATRIX OF STEPHEN WHEELER, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

FILED DECEMBER 30, 1903.

APPEALS FROM THE COURT OF CLAIMS.

(18794 AND 19176.)

18520

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 199.

THE UNITED STATES, APPELLANT,

vs.

MARY K. WHEELER, ADMINISTRATRIX OF STEPHEN WHEELER, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

STEPHEN WHEELER
vs.
THE UNITED STATES. } No. 20866.

Petition. Filed August 18, 1897.

To the honorable judges of the Court of Claims:

Your petitioner, Stephen Wheeler, a citizen of the United States, and a resident of Fort Smith, in the State of Arkansas, respectfully shows:

That from the 18th day of August, 1891, to the 31st day of March, 1897, he was clerk of the United States dist. & cir. courts and commissioner of the circuit court of the United States for the western district of Arkansas, duly qualified, and acted as said clerk and commissioner.

That your petitioner presented to the accounting officers of the
2 Treasury for payment his accounts for services as said clerk from the 18th day of August, 1891, to the 30th day of March, 1897, and his accounts for services as said commissioner from the 1st day of January, 1892, to the 31st day of March, 1892, sworn to and duly approved by the court, as required by the act of February 22, 1875, 18 Stat. L., 333; that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit "A," herewith attached and made a part of this petition.

Petitioner claims that, in accordance with the provisions of sections 828 and 847 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid and approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the *the* Treasury for payment of said fees, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to anyone for him, nor has any part of the same been allowed to him in any way, as a credit or set-off, by any officer or department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court in accordance with law.

Your petitioner further avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation as clerk, if said fees were added, would not exceed the maximum compensation of $3,500 for any one year.

3 Wherefore your petitioner prays judgment against the defendant for $1,436.75.

STEPHEN WHEELER.

By his attorney,
CHARLES C. LANCASTER,
Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 18th day of August, 1897.

[SEAL.] WILLIAM H. BADEN,
Notary Public, D. C.

4 EXHIBIT A.

UNITED STATES OF AMERICA, *Dr.:*

To Stephen Wheeler, clerk of the district and circuit courts of the United States and commissioner of the circuit court of the United States for the western district of Arkansas, for services rendered on behalf of the United States in various criminal cases from August 18, 1891, to March 31, 1897, to wit:

Fees of clerk.

Item 1. For affixing seals of court to copies of mittimus to be delivered to jailers by U. S. marshal with prisoners, at 20 cents each, disallowed, as follows:

Report 132,636, item 1	$11.60

Item 2. For filing and entering separate accounts of U. S. marshal for fees and disbursements, at 10 cents each, disallowed, as follows:

Report 132,636, item 3	$35.70
" 134,779, item 1	59.60
" 156,664, item 6	32.80
	128.10

Item 3. For administering oaths to witnesses to testify in various cases on trial, by order of the judge, at 10 cents each, disallowed, as follows:

Report 132,636, item 6	$1.00
" 139,689, item 1	8.20
" 142,912, item 1	32.00
" 142,913, item 1	3.80
" 146,373, item 3	7.10
" 148,642, item 2	6.60
	58.70

Item 4. For administering oaths by order of the court to certain persons summoned to serve as grand and petit jurors to test their qualifications to serve as jurors, at 10 cents each, disallowed, as follows:

Report	18,150, item 4	$8.50
"	22,810, item 2	8.40
"	24,764, item 1	2.30
"	27,367, item 2	7.80
"	28,301, item 2	7.00
		34.00

Item 5. For making certified copies of writ of venire for marshal to serve on persons selected to act as jurors, at 10 cents per folio, with certificate to each copy, at 15 cents each, disallowed, as follows:

Report	132,636, item 4	$18.75
"	156,664, item 3	20.00
"	7,538, item 4	20.00
		58.75

Item 6. For entering on docket orders of court opening and adjourning court each day, one folio each, at 15 cents per folio, disallowed, as follows:

Report	132,638, item 1	$9.90
"	137,820, item 4	22.20
"	139,689, item 3	17.70
"	142,912, item 4	23.40
"	142,913, item 5	22.50
"	146,373, item 5	23.10
"	148,642, item 5	23.10
"	150,287, item 1	13.80
"	154,646, item 3	18.30
"	156,324, item 1	22.80
"	158,782, item 1	21.60
"	1,563, item 2	21.60
"	7,510, item 7	23.40
"	7,529, item 6	18.60
"	9,302, item 2	23.40
		305.40

Item 7. For administering oaths, at 10 cents, and drawing jurats, at 15 cents, to affidavits of indigent defendants to have their witnesses summoned at the expense of the United States, disallowed, as follows:

Report	134,779, item 2	$21.25
"	135,114, item 2	3.00
"	142,912, item 2	3.25
"	142,913, item 2	1.50
"	146,373, item 2	1.75
"	148,642, item 1	1.75

Report	7,510, item 5	$0.75
"	7,538, item 1	2.85
"	28,301, item 5	.10
		36.20

Item 8. For filing applications of indigent defendants to have their witnesses summoned at the expense of the United States, at 10 cents each, and entering orders of court granting the same, at 15 cents per folio, disallowed, as follows:

Report	16,142, item 1	$7.20
"	17,187, items 1, 2	2.75
"	18,150, item 3	6.90
"	22,698, items 3, 4	3.00
"	22,810, items 1, 4	16.00
		35.85

Item 9. For drawing certificates to copies of sci. fa. to be served by the marshal on defendants according to the practice of the court, at 15 cents each, disallowed, as follows:

Report	134,779, item 3	$3.00

Item 10. For making dockets, indexes, taxing costs, &c., in cases where issue was joined by entering plea of not guilty and afterwards entering said plea withdrawn and entering plea of guilty, at $2.00 in each case, $1.00 in each case disallowed, as follows:

Report	134,779, item 4	$8.00
"	137,820, item 3	1.00
"	156,664, item 1	1.00
		10.00

Item 11. For making dockets, indexes, taxing costs, &c., in two separate contempt cases where the cause was either dismissed or judgment rendered without issue, $1.00 in each case charged and disallowed, as follows:

Report	2,089, item 3	$2.00

7 Item 12. For drawing certificates to certified copies of indictments and lists of jurors delivered to defendants indicted for capital offenses, according to the practice of the court, at 15 cents each, disallowed, as follows:

Report	135,114, item 3	$1.95
"	137,820, item 2	1.95
"	139,689, item 2	.15
"	146,373, item 1	6.15
"	148,642, item 4	.60
		10.80

Item 13. For drawing certificates to certified copies of orders of court for marshal to furnish meals to juries at the expense of the United States, at 15 cents each, disallowed, as follows:

Report	135,114, item 3	$1.05
"	137,820, item 1	.90
"	139,689, item 2	.15
"	142,912, item 3	1.50
"	142,913, item 3	.45
"	146,373, item 4	1.05
"	148,642, item 3	1.20
		6.30

Item 14. For taking one acknowledgment of defendants and sureties to each recognizance, at 25 cents, disallowed, as follows:

Report	17,187, item 3	$1.75
"	18,150, item 1	17.25
"	22,810, item 3	18.50
"	28,301, item 4	8.25
		45.75

Item 15. For filing motion of defendant for a new trial, at 10 cents each, and entering orders of court overruling the same, at 15 cents per folio, disallowed, as follows:

Report	2,089, item 1	$1.00
"	7,510, item 4	.30
"	7,529, item 8	.60
"	9,302, item 1	.40
		2.30

8 Item 16. For making separate entries at different times on the docket of separate and distinct proceedings in various cases, consisting of separate pleadings and orders of court, one folio each, at 15 cents per folio, disallowed, as follows:

Report	132,636, items 2, 7	$0.45
"	7,529, items 1, 2, 3	.75
"	7,538, item 2	5.85
"	18,150, item 2	16.20
"	22,810, item 5	21.00
"	27,367, item 4	2.70
"	28,301, item 3	.75
		47.70

Item 17. For filing and entering separate bills of exception, assignments of error, petitions for writs of error; entering on docket orders of court thereon, entering on docket orders of court to stay judgments, issuing citations and writs of error and making copies with certificates, and

for making transcript for Supreme Court with certificate and seal, disallowed, as follows:

Report	16,142, item 4	$326.60
"	17,187, item 5	19.20
"	22,698, item 2	102.80
"	24,679, item 1	170.70
		619.30

Fees of commissioner.

Item 18. For administering oaths to 210 witnesses summoned to testify on hearing and deciding criminal charges in various cases where defendants were charged with offenses against the laws of the United States, at 10 cents each, disallowed, as follows:

Report	137,575, item 2	$21.00
	Total amount claimed	1,436.75

9 *II. Suggestion of the death of the claimant and substitution of administratrix.*

Now comes Mary K. Wheeler, by her attorney, and informs the court of the death of Stephen Wheeler, late claimant in the above-entitled ca se, and that she has been duly appointed administratrix of the estate of the said Stephen Wheeler, deceased, as appears by an authenticated copy of letters of administration on his estate, filed in case No. 20863, and the said Mary K. Wheeler, administratrix, by her attorney, now moves the court to be substituted in the place of said Stephen Wheeler, deceased, as party claimant, and that she be admitted to prosecute the suit.

Filed October 14, 1897.

C. C. LANCASTER,
Attorney for Claimant.

Allowed.

BY THE COURT.

OCTOBER 14, 1897.

III. Traverse. Filed May 15, 1902.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.
W.

Filed May 15, 1902.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, Mary K. Wheeler, a citizen of the United States and a resident of Fort Smith, in the State of Arkansas, is the administratrix of the estate of Stephen Wheeler, deceased, late of said city and State.

II.

From the 18th day of August, 1891, to 31st day of March, 1897, the said Stephen Wheeler was a clerk of the district and circuit courts of the United States and a commissioner of the circuit court of the United States for the western district of Arkansas, duly qualified and acting.

III.

During said period he rendered services as said clerk and commissioner on behalf of the United States and made up his accounts for the same, which were duly verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were duly entered of record; said accounts were then presented to the accounting officers of the Treasury Department for payment. Part was paid, but payment of items embraced in Finding IV was refused.

IV.

Fees of clerk.

Item 1. For affixing seals of court to 58 separate copies of mittimus, to be delivered to the jailers by the United States marshal with 58 prisoners committed to jail at various times by the court, as their authority to hold the prisoners, at 20 cents each..... $11.60

The clerk was ordered by the court to make certified copies, and the certificate is in the following form:

"I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above-entitled cause as the same appears of record.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this —— day of ———, 189—.

[SEAL.] "STEPHEN WHEELER, *Clerk.*"

Item 2. This item is abandoned.

11 Item 3. For administering oaths to 587 witnesses for defendants, to testify in various criminal cases on trial, by oral order of the judge, at ten cents each $58.70

Item 4. For admin stering oaths to 340 persons summoned to serve as grand and petit jurors before examination by the court to determine their qualifications for service as jurors, at ten cents each $34.00

These oaths were administered by order of the court. The person to whom the oath was administered was not a juror when sworn, but the oath was administered to test his qualification to serve as a juror. No charge is claimed for oath to a person after he has been accepted as a juror.

Item 5. For making certified copies of writ of venire facias for marshal to serve on persons summoned to serve as jurors, at ten cents per folio, with certificate to each copy, at 15 cents each:

(a) Copies $23.50
(b) Certificates 35.35

These certified copies were made by order of the court, to be served by the marshal on each person summoned, and the practice and charges were approved by the court.

Item 6. For entering on separate dockets of the common law and chancery courts the orders of court opening and adjourning court from day to day, one folio each at 15 cents per folio $305.40

The opening and adjourning orders in both records were ordered made by the court on each day that court was opened and adjourned, and each day's proceedings in both records were signed by the judge. These charges are for services rendered in the circuit court during the
12 calendar year 1895, for which year claimant received within $119.43 of his maximum compensation.

Item 7. For administering oaths, at 10 cents each, and drawing jurats, at 15 cents, to affidavits of indigent defendants to have their witnesses summoned at the expense of the United States under section 878, Rev. Stats $36.20

This service and charges were approved by the court and have always been allowed by the accounting officers of the Treasury until recently.

Item 8. For filing and entering written applications of indigent defendants to have their witnesses summoned at the expense of the United States, at 10 cents each, and entering orders of court granting the same, at 15 cents per folio..... $30.45

This service and charges were approved by the court; $1.80 of this amount is for services rendered in the circuit court during the calendar year 1895.

Item 9. For drawing certificates to copies of sci. fa. to be served by the marshal on defendants, at 15 cents each $3.00

It is the practice of this court to serve certified copies of process, and the services and charges have always been approved by the court. No order of court shown.

Item 10. For making dockets, indexes, taxing costs, etc., in cases where issue was joined by the plea of not guilty, and afterwards entering said plea withdrawn and entering plea of guilty, at $2.00 each $10.00

The cases having been finally disposed of.

Item 11. For making dockets, indexes, taxing costs, etc., in two separate contempt cases where the cause was either dismissed or judgment rendered without issue, $1.00 each..... $2.00

Item 12. For drawing certificates to copies of indictments and lists of jurors and witnesses delivered to the marshal
13 to be served on defendants indicted for capital offenses, as required by section 1033, Rev. Stats., at 15 cents each.. $10.80

Item 13. For drawing certificates to certified copies of orders of the court for marshal to furnish meals to jurors at the expense of the United States, at 15 cents each $6.30

No order of court shown.

Item 14. These charges having been paid are now abandoned.

Item 15. For filing and entering 17 written motions of indigent defendants, under section 878, Rev. Stats., for a new trial, at 10 cents each, and entering orders of court overruling the same, one folio each, at 15 cents per folio..... $2.30

$1.00 is for services rendered in circuit court during the year 1895.

Item 16. For making separate entries of orders of continuances and of recognizances on separate dockets in various cases, at 15 cents per folio..... $18.60

The practice of the court requires separate dockets for the entry of these court proceedings; 75 cents of this sum is for services rendered in the circuit court during the year 1895.

Item 17. For filing and entering separate bills of exceptions, assignments of error, petitions for writs of error, entering on docket orders of the court thereon, orders of court to stay judgments, issuing of citations and writs of error, and for making transcripts of record for the Supreme Court of the United States in certain capital cases under the act of February 6, 1889, at 10 cents for filing and entering each paper, and 15 cents per folio for entering orders and making transcripts..... $619.30

$326.60 is for services rendered in the circuit court during the year 1895. The defendant in each case filed with the clerk of the court
14 poverty affidavit stating his inability to pay the costs of the proceeding of the writ of error. The services were rendered by the direction of the court, and the charges have been approved by the court in the accounts of claimant, as required by the act of February 22, 1875.

Fees of commissioner.

Item 18. For administering oaths to 210 witnesses summoned to testify on hearing and deciding criminal charges in various cases where defendants were charged with offenses against the laws of the United States, at 10 cents each..... $21.00

The State law requires the testimony of witnesses under oath to be reduced to writing before justices of the peace.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment from the United States on items 1, 3, 5, 6, for the sum of $119.43; 7, 8, for the sum of $28.65; 10, 11, 12, 15, for the sum of $1.30; 16 for the sum of $17.85; 17 for the sum of $292.70, and 18, of Finding IV, in the sum of six hundred and sixty-nine dollars and eight cents ($669.08).

All other items not withdrawn or abandoned are disallowed.

BY THE COURT.

Filed June 2, 1902.

15 *V. Judgment of the court.*

MARY K. WHEELER, ADMRX. OF STEPHEN WHEELER, deceased, *vs.* THE UNITED STATES. } No. 20866.

At a Court of Claims held in the city of Washington on the second day of June, 1902, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said claimant, Mary K. Wheeler, as administratrix of Stephen Wheeler, deceased, do have and recover of and from the United States the sum of six hundred and sixty-nine dollars and eight cents ($669\frac{08}{100}$).

BY THE COURT.

16 *VI. Defendants' motion for new trial. Filed October 2, 1902.*

Now come the defendants, by their Attorney-General, and move for a new trial in this case, on the grounds that there was error of law in the judgment of the court, in this: That judgment was rendered for the claimant on items 3, 5, 7, 8, 15, and 17, of the fourth findings made by the court, when judgment ought to have been rendered thereon for the United States.

L. A. PRADT,
Assistant Attorney-General.
P. M. ASHFORD,
Assistant Attorney.

Order of court. Filed December 1, 1902.

It is ordered by the court that the defendants' motion for a new trial in the above-entitled case be, and the same is hereby, overruled.

17 *VII. Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the second day of June, 1902, in favor of the claimant, the defendants, by their Attorney-General, on the second day of October, 1902, make application for, and give notice of, an appeal to the Supreme Court of the United States.

L. A. PRADT,
Assistant Attorney-General.

Filed October 2, 1902.

At a Court of Claims held January 13, 1903, the foregoing application for appeal was allowed as prayed for.

BY THE COURT.

18 *VIII. Application of claimant for and allowance of appeal.*

From the judgment rendered in the above-entitled cause, on the second day of June, 1902, the claimant, by her attorney, on the third day of October, 1902, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

An' the claimant assigns as errors of law:

First. The conclusion of law made by said court in disallowing items 4, 9, and 13, respectively, of claimant's Exhibit A to the petition on the facts found by the court.

Second. The refusal of said court to render judgment in favor of the claimant for the amounts claimed in said items.

CHARLES C. LANCASTER,
Attorney for Claimant.

Filed October 3, 1902.

At a Court of Claims held January 13, 1903, the foregoing application for appeal was allowed as prayed for.

BY THE COURT.

19 Court of Claims, Washington, D. C.

MARY K. WHEELER, ADMINISTRATRIX of Stephen Wheeler, deceased, *vs.* THE UNITED STATES. } No. 20866.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of court, of the application of the defendants and

of the claimant, respectively, for the allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17 day of January, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18794. Court of Claims. Term No. 199. The United States, appellant, vs. Mary K. Wheeler, administratrix of Stephen Wheeler, deceased. Filed January 21, 1903.

FILE COPY.

Office Supreme Court U.S.
FILED
DEC 21 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANTS,
v.
MARY K. WHEELER, ADMINISTRATRIX of Stephen Wheeler, deceased. } No. 199.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

18528

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
v.
MARY K. WHEELER, ADMINISTRATRIX OF Stephen Wheeler, deceased.
No. 199.

APPEAL FROM COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF CASE.

Stephen Wheeler was clerk of the United States courts for the western district of Arkansas during the time the services claimed for in this suit were performed. In the settlement of his accounts as such officer, certain disallowances were made by the accounting officers of the Treasury Department. Suit was brought therefor in the Court of Claims, and prosecuted by his administratrix, the appellee. Judgment was rendered in favor of said appellee. From this judgment the United States appealed. The claimant below made application for appeal from said judgment, which application was allowed, although the amount of the judgment was less than $3,000.

The questions raised by these respective appeals are, first, as to the validity of the judgment against the United States on certain of the findings of facts, which will be specifically designated in the assignments of error, and, second, as to the jurisdiction of the court to consider the appeal of the claimant.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the appellant on item 3 of Finding IV of the findings of fact (transcript, p. 8).

2. In rendering judgment against the appellant on item 7 of Finding IV of the findings of fact (transcript, p. 8).

3. In rendering judgment against the appellant on item 8 of Finding IV of the findings of fact (transcript, p. 8).

4. In rendering judgment against the appellant on item 15 of Finding IV of the findings of fact (transcript, p. 9).

5. In rendering judgment against the appellant on item 17 of Finding IV of the findings of fact (transcript, p. 9).

ARGUMENT.

The charge under item 3, referred to in the first assignment of error, is for administering oaths to witnesses for defendants on trial.

The finding shows that the court gave oral direction or order to the clerk to perform this serv-

ice. It does not follow from this fact, however, that the United States is bound to pay for said service. In the progress of the trial, when the State rests, it is in order to swear the witnesses for the defendant. The court very properly indicates when that step shall be taken by addressing the clerk thus: "Swear the witnesses for the defense," or in words to that effect. Suppose the clerk should proceed to do this without waiting for the suggestion or order from the court. Would it shift the liability for fees for said oaths? Is the so-called order of the court necessary to charge the United States with the payment of the charges for this service? We think not. Either the United States is chargeable with this service under its general liability to the clerk for his services, in conformity with the fee bill, or it is not liable at all. The so-called order of the court can have no effect either one way or the other in fixing liability for said service.

There is a well-established doctrine that defendants must pay their own costs; that is to say, fees for all services performed at the instance and request of defendant must be paid by him, or at least charged to him. There is only one exception to this rule, and that is to be found in section 878, Revised Statutes. There is nothing in the findings of fact to show that the defendants for whom these witnesses were sworn were adjudged indigent in accordance with the provisions of said

section. This section, we claim, is exclusive, and clearly indicates an intention on the part of Congress to prohibit the payment of all other charges against the United States for services rendered for defendants. It is a well-settled rule of construction that what is expressed in a statute is exclusive where some power or privilege is granted by the statute. (Sunderland on Statutes and Statutory Construction, par. 325 et seq.) This section is creative of a right—a privilege extended to indigent defendants. The statute certainly shows that Congress recognized and approved the doctrine that the United States is not chargeable with the costs incurred by defendants, otherwise legislation in behalf of indigent defendants would have been unnecessary.

Swearing defendant's witnesses is as much a service rendered at the instance and request of defendant as is the issuance of subpœna for those selfsame witnesses. It certainly can not be said that the Government would be liable for the latter service unless the defendants have been brought within the provisions of section 878. (See *United States* v. *Dundy*, 76 Fed. Rep., 357.)

The charge under item 7, referred to under the second assignment of error, is for administering oaths of poverty to indigent defendants, under section 878, Revised Statutes, and for affixing jurats to said oaths or affidavits.

Said section provides for the payment of the

"costs incurred by the process and the fees of the witnesses" in the cases of indigent defendants. According to the plain reading of this statute, the Government's liability for the costs does not begin until the court has ordered process to be issued for defendant's witnesses under said section. This would, of course, exclude charges for preparing affidavits of poverty, and consequently for affixing jurats thereto. If the United States is liable at all for the charge of preparing said affidavits, it is liable in cases where the application is refused, as well as in cases where it is granted. It will hardly be contended that the United States should pay for preparing these affidavits in cases where the defendant's application for process is not granted by the court. (2 Comp. Decs., 224; *Dundy case*, 76 Fed. Rep., 357.)

The charge under item 8, referred to in the third assignment of error, is for filing and entering the applications of defendants for process under section 878.

This charge is open to the objection stated to the preceding one. It is not seen that there was any necessity for a formal application for process under said section, aside from the affidavit of poverty. However, that is a matter of practice, which is not in question in this case. It is perfectly plain, though, that if an application were made to the court it should be filed before any action was taken thereon. It follows, therefore, that the charge for

filing such an application might, under some circumstances, be made in cases where the application was refused. Plainly, it is not a charge coming within the classification of charges allowed in cases of indigent defendants under section 878.

The charge made under item 15, referred to in the fourth assignment of error, is for filing and entering motions of indigent defendants for new trial.

This charge is claimed under authority of section 878, Revised Statutes. The defendants filing said motions for new trial had been regularly and duly declared indigent. It is our contention, however, that the fee for filing said motions was one chargeable to the defendants, not falling within the class of fees which the Government undertakes to pay in such cases. (*Dundy case*, 76 Fed. Rep., 357.)

The charges made under item 17, referred to in the fifth assignment of error, are for services performed at the instance and request of the defendant in a criminal case in the matter of the prosecution of a writ of error from the Supreme Court of the United States under the provisions of the act of February 6, 1889 (25 Stats. L., — 655).

The defendant in said case had been regularly adjudged indigent by the trial court. The services were rendered by direction of the court. However, it was entirely unnecessary for the court to direct the performance of said services [illegible]

plainly declares it to be the duty of the clerk to certify and transmit to the Supreme Court a transcript of the record in such case.

What has been said with reference to the provisions of section 878, Revised Statutes, in connection with the preceding items is applicable here. Said charges clearly fall outside the fees agreed to be paid by authority of said section. However, it was urged in the trial below that the United States is chargeable with the costs and expense of making transcripts and filing and entering papers in connection with writs of error sued out by indigent defendants in capital cases by the provisions of section 6 of the act of 1889. Said section provides:

> That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error it shall be the duty of the clerk of the court to which the writ shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a

certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same.

It will be observed that this section fails to provide that any of the costs incurred by the respondent shall be paid by the United States or that the United States shall under any circumstances be liable for such costs. The gist of the statute is the granting of the right to sue out the writ of error, and, for the purpose of giving to the person convicted of a capital offense every opportunity for carrying his case to the highest tribunal of the land, provision is made excluding him from the usual requirement of giving bond to save the United States harmless from all costs in case his suit in the Supreme Court should fail as required by section 1000, Revised Statutes. The act of 1889 simply relieves the respondent of this requirement, and permits him to carry his case to the Supreme Court without the necessity of securing the costs to the United States. Inasmuch as it is always assumed that the defendant pays his own costs as they accrue, subject to the exception provided in section 878, it is clear that the costs which the respondent is required by said section (1000, R. S.) to secure are only the costs which the United States would be compelled to make in following the proceedings in error. Certainly nothing in the act of 1889 can be said to express or imply an intention on the part of Congress that the

United States should pay the costs incurred by defendants in criminal cases in prosecuting suits on error in the Supreme Court.

The fact that the clerk of the trial court and the clerk of the Supreme Court are required to perform certain duties in connection with the allowance of such writ and the prosecution of same does not, of itself, establish their right to compensation therefor. Compensation is not given for every service required of an officer who receives his compensation by fees. Attorneys at the bar are frequently called upon in the Federal courts to defend indigent prisoners, and they must do so without compensation from the United States. There is no good reason why a clerk of the court should not, by the same token, be required to contribute his services under such circumstances. (See *United States* v. *King*, 147 U. S., 676; *United States* v. *Patterson*, 150 U. S., 65–69; *United States* v. *Shields*, 157 U. S., 88–91.)

This brings us to the consideration of claimant's appeal. It is proper to say in this connection that no objection was offered to the allowance of claimant's application for appeal. We were willing then and are willing now to have the matters complained of presented to this court for its decision, if it can be done in accordance with law. However, upon examination of the subject it seems to us that the application of the claimant below for appeal was improperly allowed, and that

this court is without jurisdiction in the premises. One of the conditions upon which the United States consents to be sued in the Court of Claims is that the claimant shall not have the right to appeal unless the amount of the judgment in the case exceeds $3,000. The amount of the judgment in the case at bar was only $619. Therefore, we say, this is a jurisdictional question.

The rights of the parties in the Court of Claims to appeal are to be determined by this court. (*Adams case*, 6 Wall., 101; *Walsh case*, 23 C. Cls. R., 1.) Under the statute (section 707) it is clear that the claimant below had no right of appeal. Neither can he assign error on the appeal taken by the United States. (*Hickey case*, 17 Wall., 9; 8 C. Cls. R., 114.) There is nothing before the court for consideration except the matters assigned as error by the appellant. The claimant below is not the appellant, and, manifestly, can not be.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, *Appellant*,
vs.
MARY K. WHEELER, *Administratrix of Stephen Wheeler, Deceased.* } No. 199.

MARY K. WHEELER, *Administratrix, Appellant*,
vs.
THE UNITED STATES, *Appellee.* } No. 525.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR MARY K. WHEELER, ADMINISTRATRIX.

CHARLES C. LANCASTER,
Counsel for Administratrix.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9171

Supreme Court of the United States.

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THE UNITED STATES, *Appellant*,
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MARY K. WHEELER, *Administratrix of Stephen Wheeler, Deceased.* } No. 199.

MARY K. WHEELER, *Administratrix, Appellant*,
vs.
THE UNITED STATES, *Appellee.* } No. 525.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR ADMINISTRATRIX.

Statement of Facts.

This is an appeal by the United States from a judgment of the Court of Claims in favor of the claimant, and a cross-appeal by the claimant. The appeal by the United States assigns errors to items 3, 7, 8, 15, and 17 of the findings of fact, which, as shown by the record (pp. 8, 9), are as follows:

"Item 3. For administering oaths to 587 witnesses for defendants, to testify in various criminal cases on trial, by oral order of the judge, at 10 cents each, $58.70.

"Item 7. For administering oaths at 10 cents each and drawing jurats, at 15 cents, to affidavits of indigent defendants to have their witnesses summoned at the expense of the United States under section 878, Rev. Stats., $36.20. This service and charges were approved by the court, and have

always been allowed by the accounting officers of the Treasury until recently.

"Item 8. For filing and entering written applications of indigent defendants to have their witnesses summoned at the expense of the United States, at 10 cents each, and entering orders of court granting the same, at 15 cents per folio, $30.45. This service and charges were approved by the court; * * *

"Item 15. For filing and entering 17 written motions of indigent defendants, under section 878, Rev. Stats., for a new trial, at 10 cents each, and entering orders of court overruling the same, one folio each, at 15 cents per folio, $2.30.

"Item 17. For filing and entering separate bills of exceptions, assignments of error, petitions for writs of error, entering on docket orders of the court thereon, orders of court to stay judgments, issuing of citations and writs of error, and for making transcripts of record for the Supreme Court of the United States in certain capital cases under the act of February 6, 1889, at 10 cents for filing and entering each paper, and 15 cents per folio for entering orders and making transcripts, $619.30.

"The defendant in each case filed with the clerk of the court a poverty affidavit stating his inability to pay the costs of the proceedings for the writ of error. The services were rendered by direction of the court, and the charges have been approved by the court in the accounts of claimant, as required by the act of February 22, 1875."

BRIEF OF ARGUMENT.

Item 3. The court below found, and it is admitted by counsel for appellant, that the claimant administered these oaths to witnesses for defendants to testify in criminal trials by ORDER OF THE COURT.

This being conceded, the law of the case is plain and settled.

The statute authorizing these fees is section 828, Revised Statutes, clause 4, which provides:

"For administering an oath or affirmation, except to a juror, ten cents."

When these oaths are administered to witnesses for the defendant in a criminal case by order of the court, it is the *duty of the clerk of the court to obey* said order, and the fees are chargeable to the United States, for the reason that the order is mandatory, and leaves the clerk of the court no option to disobey said order until his fees are paid by the defendant. Under the order of the court, the service rendered by the clerk of the court is for the benefit of the United States, as the defendant is legally presumed to be innocent until proven guilty. The legal effect of this order has the same force as a statute authorizing compensation.

This court has sustained this point in the following language:

"When the clerk performs a service in obedience to an order of court, he is as much entitled to compensation, as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services" (U. S. *vs.* Van Duzee, 140 U. S., 177, item 10).

Similar conclusions of law were announced by this court in the following cases:

U. S. *vs.* Barber, 140 U. S., 164, item 3.
U. S. *vs.* Jones, 147 U. S., 674, item 2.
U. S. *vs.* Payne, 147 U. S., 689, item 2.

Counsel for defendant relies on section 878, Revised Statutes, but that section has no application here for the reason that the witnesses for the prisoner were in court, and process was not necessary to bring them. The distinction is obvious and controlling.

The court below found in its III findings of fact that the accounts of claimant containing these services were presented to the United States court for approval, and orders approving the same as being just and according to law were entered of record, as required by the act of February 22, 1875 (18 Stats., 333).

In construing the legal effect of this approval this court said:

"The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875 (18 Stats., 333), is *prima facie* evidence of the correctness of the items of that account, and in the absence of *clear and unequivocal proof of mistake on the part of the court, it should be conclusive.*"

U. S. *vs.* Jones, 134 U. S., 483.

Items 7, 8, and 15 are similar in fact and law, and the services are authorized by sections 828 and 878, Revised Statutes. Counsel for appellant contends that the claimant has charged for preparing affidavits of indigent defendants, and that such charge is illegal. The record fails to sustain this contention. The charges made and here claimed are for administering oath and drawing jurat to the affidavit, filing same and entering orders of court granting the application for process, but no charge is made for drawing the affidavit. The service is clearly within the benign provisions of section 878 of the Revised Statutes, and this interpretation of the section was sustained by the United States court which approved the charges in the accounts of claimant.

The indigent defendant being unable to pay any costs, as shown by the fact that the court allowed his application for process at the expense of the United States, it was the duty of the clerk to perform this service for the benefit of the United States, and in the interest of substantial justice, as fully contemplated by the scope and purpose of section 878 of the Revised Statutes.

The charges for filing written motions of indigent defendant for a new trial and entering orders of court overruling the same are within the same scope of the above section, and the United States is liable for the cost. This construc-

tion was placed on this section by the accounting officers of the Treasury, as the court below found the following facts:

"This service and charges were approved by the court, and *have always been allowed* by the accounting officers of the Treasury until recently."

This long-continued practice, of itself, should settle the controversy in favor of the appellee.

U. S. *vs.* McDermott, 140 U. S., 151, item 3.
U. S. *vs.* Finnell, 185 U. S., 236.

Item 17. This service was performed in strict compliance with the provisions of section 6 of the act of February 6, 1889 (25 Stats., 656). As this section is printed in full in appellant's brief, it is omitted here.

The act specially provides that: "Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs."

This provision clearly makes it obligatory upon the United States to pay the clerk for his services incident to this writ of error, as it distinctly deprives the clerk of any remedy against the defendant to secure his costs. Under this act the United States requires the clerk to perform this service in the interest of justice, and it assumed all liability for the costs of the proceedings. It would be contrary to all reason and fairness to assume that the United States required the clerk to perform this important and onerous service without compensation. To say that the defendant should pay this cost is answered by the fact that each defendant filed with the clerk a poverty affidavit, showing his inability to pay the cost of this proceeding. The service being mandatory on the clerk by positive statutory enactment, and by direction of the court, it was performed for the benefit of the United States and the United States should pay for it. The fees are clearly authorized by section 828, Revised Statutes.

This view of the statute was taken by the United States court, which approved the accounts of claimant containing the services and fees here claimed. The legality of the services and charges are fully established by the following authorities.

In the Van Duzee Case, 140 U. S., 177, this court said:

"When the clerk performs a service in obedience to an order of court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

In this case the compensation is specially provided for in section 828 of the Revised Statutes.

In the Jones case, 147 U. S., 675, item 2, this court, in passing upon the legal effect of the order of court requiring its clerk to perform certain services, held:

"The account in question is clearly within this section. Supposing it, however, to be a question of doubt, if the court assumed jurisdiction to make such order, and the clerk obeyed it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity of such order being made. In fact he would be guilty of contempt in refusing to make such entry. The Government cannot, in this collateral proceeding attack the power of the court to make this order."

Counsel for appellant contends that the clerk of the court should perform this service without compensation and cites U. S. *vs.* King, 147 U. S., 676; U. S. *vs.* Patterson, 150 U. S., 65; U. S. *vs.* Shields, 153 U. S., 88.

The point in the King case was that there was no law providing a fee to the clerk acting as jury commissioner, and he was not entitled to extra compensation.

The same point was made in the Patterson case that the fee bill did not provide a *per diem* to a commissioner of the circuit court for hearing and deciding charges by a com-

plaining witness to determine whether a warrant should issue.

The point in the Shields case was that the fee bill did not authorize compensation to a district attorney for travel in going to his home every Saturday and returning to court the following Monday, during the continuous session of the court.

It will thus be seen that neither of these authorities has any application to the present case, for the very obvious reason that in the present case every service and charge made is distinctly and specifically provided for by the fee bill (section 828, Rev. Stats.).

If there were any service or charge herein claimed which is not provided by the fee bill, counsel for appellant has entirely failed to set it up in the record, and therefore his contention must be overruled.

APPEAL OF CLAIMANT.

STATEMENT OF FACTS.

This is an appeal by the claimant in the nature of a cross-appeal from the judgment of the Court of Claims on items 4, 9, and 13 of the findings of fact, which are as follows:

"Item 4. For administering oaths to 340 persons summoned to serve as grand and petit jurors before examination by the court to determine their qualifications for service as jurors, at 10 cents each, $34.00. These oaths were administered by order of the court. The person to whom the oath was administered was not a juror when sworn, but the oath was administered to test his qualification to serve as a juror. No charge is claimed for oath to a person after he has been accepted as a juror."

"Item 9. For drawing certificates to copies of *sci. fa.* to be served by the marshal on defendants, at 15 cents each, $3.00. It is the practice of this court to serve certified copies

of process, and the services and charges have always been approved by the court. *No order of court shown.*"

"Item 13. For drawing certificates to certified copies of orders of the court for marshal to furnish meals to jurors at the expense of the United States, at 15 cents each, $6.30. No order of court shown."

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the claimant on items 4, 9, and 13 of claimant's petition on the findings of fact by the court.

2. The refusal of said court to render judgment in favor of the claimant for the amounts claimed in said items.

BRIEF OF ARGUMENT.

Objection is made by counsel for the United States to the jurisdiction of this court to consider this cross-appeal. But this objection can have no force for the following reasons: The principal appeal and the cross-appeal are to be taken as one appeal. It cannot be disputed that the court has jurisdiction of the Government's appeal, since there is no limit placed by law upon the amount involved when an appeal is taken by it from the Court of Claims. Having then jurisdiction of that appeal, it has also jurisdiction of the cross-appeal. This has been held by this court.

"Where the appeal is from a decree sufficient in amount to give the court jurisdiction (and the Government appeal is sufficient in amount to give jurisdiction) a cross-appeal will not be dismissed, although it is from a decree awarding against the defendant below less than that amount, as the appeal opened the whole controversy in this court."

Walsh *vs.* Mayer, 111 U. S., 31.

In that case the court, by Mr. Justice Matthews, said:

"We have disposed of the case upon both appeals. The motion to dismiss the cross-appeal of the defendant below, for want of jurisdiction on the ground that the amount in controversy is less than $5,000, is overruled. The cross-appeal it is true, is from a decree awarding against defendants below less than that amount, and it could not therefore be maintained by itself; but the appeal of the plaintiffs below to which it is incident, opened the whole controversy here so far as they were concerned, and that of the defendant must be allowed to have the like effect as to them, so that upon both appeals the case was brought up as it stood for hearing in the court below, the claims of the respective parties involving the question of liability as to the whole amount."

Again, the jurisdiction of this court attached to this case when the Government appealed. On that appeal, where cross-appeal is taken, the whole case is opened as to jurisdiction, and therefore, having once attached, it cannot be taken away by a change in the value of the subject of controversy.

Cook *vs.* U. S., 2 Wall., 218.

In United States *vs.* Ewing, 140 U. S., 150, Justice Brown, in delivering the opinion of the court, uses the following language:

"These are all the items to the allowance of which exception was taken by the Government. It is true that a number of items were objected to by the court below, which upon the authority of The United States *vs.* Jones, 134 U. S., 483, appear to have been properly allowable, but as no appeal was taken by the plaintiff from the disallowance of such items we do not feel at liberty to consider them."

U. S. *vs.* Jones, 147 U. S., 676, item 4.
United States *vs.* Hickey, 17 Wall., 9.

The jurisdiction to hear this cross-appeal being fully established, the items in controversy will be considered.

Item 4. The charge for these oaths is clearly legal. The fee is provided by the fourth clause of section 828 of the Revised Statutes, to wit:

"For administering an oath or affirmation, except to a juror, ten cents."

The findings of fact show that these oaths were administered by order of court. The claimant is therefore entitled to compensation (Van Duzee case, 140 U. S., 177).

The findings of fact further show that the person to whom the oath was administered was *not a juror when sworn*, but the oath was administered to test his qualification to serve as a juror, and that no charge is claimed for oath to a person after he has been accepted as a juror.

These undisputed facts bring the service and charge squarely within the fee bill.

The proof clearly shows that the persons to whom these oaths were administered by order of the court were not jurors either in fact or in law. The oath was administered to them as individuals in order that the court could ascertain from their sworn answers whether they were legally qualified to serve in the capacity of jurors. If they were not qualified and were excused, they certainly were not jurors. Then the oath must have been administered to them as individuals, and the clerk is undoubtedly entitled to his fee. If he is not a juror when excused, it follows, as a legal sequence, that he is not a juror until he has been accepted by the court. But the oath administered by the clerk was administered before the person was accepted by the court, and therefore he was not a juror at that time.

The facts here are identical with those in the Clough case, 55 Fed. Rep., 926, where the facts and the law were thoroughly examined by the court and a judgment rendered for the claimant. It appears no appeal was taken by the United States and the judgment was paid.

While the amount involved is not large, the principle is important to all the clerks of the Federal courts.

Item 9. The charge for drawing this certificate is provided for in the eighth clause of section 828 of the Revised Statutes:

"For * * * making any record, *certificate*, return, or report, for each folio, fifteen cents."

The proof shows that it was the practice of the court for the clerk to issue certified copies of *sci. fa.* for the marshal to serve, and as the paper was a copy of the court process, and to be an official copy it was necessary for the clerk to attach his certificate. The court alone can control its practice of issuing and serving its process, and when the clerk performs a service in obedience to this practice he should be paid for the service. The accounting officers of the Treasury have no legal authority to control this practice in a collateral proceeding by depriving the clerk of compensation for the service. So held in the Jones case, 147 U. S., 675, item 2; Taylor case, 147 U. S., 701.

"If a certified copy is required to be served, the service of a copy not certified is insufficient."

Works on Courts and their Jurisdiction, p. 263.

Item 13. The charge for drawing this certificate is similar to that in item 9 and the facts and the law are identical.

As the service in both items has been approved by the court, and no mistake on the part of the court has been shown by counsel for the Government, the approval is conclusive.

U. S. *vs.* Jones, 134 U. S., 483.

CHARLES C. LANCASTER,
Counsel for Mary K. Wheeler, Adm'x.

Supreme Court of the United States.

Nos. 197, 198, 199 and 525.—October Term, 1903.

197	The United States, Appellant, *vs.* Richard Jones.	Appeals from the Court of Claims.
198	The United States, Appellant, *vs.* Charles H. Gildersleeve.	
199	The United States, Appellant, *vs.* Mary K. Wheeler, Administratrix of Stephen Wheeler, deceased.	
525	Mary K. Wheeler, Administratrix of Stephen Wheeler, deceased, Appellant, *vs.* The United States.	

[April 4, 1904.]

The Chief Justice: These are appeals from judgments of the Court of Claims in respect of services alleged to have been rendered as clerks of District or Circuit Courts of the United States. In each case the accounts for services had been duly approved by the Circuit or District Court; certain items had been disallowed by the accounting officers of the Treasury Department; thereupon these suits were brought; and the Court of Claims made findings of fact and conclusions of law. In view of the action of the two courts, and of our previous decisions, the points raised in argument do not seem to require particular discussion.

In No. 197 the judgment of the Court of Claims included, among other items, this: "Administering oaths and affixing jurats to accounts of United States marshals at ten cents for each oath and fifteen cents for each jurat, $91.20."

By the act of February 22, 1875 (18 Stat. 333, c. 95,) clerks, marshals and district attorneys are required to render their accounts, duly sworn to, for approval. We agree with counsel for the government that the making of the oath and attaching the same to the account is a part of the formality of presenting such accounts, without which they are not properly rendered. This item, therefore, should not have been allowed against the

United States in favor of the clerk. *United States* v. *Van Duzee*, 140 U. S. 169; *United States* v. *Jones*, 147 U. S. 672; *United States* v. *Allred*, 155 U. S. 591.

The judgment of the Court of Claims will be modified by the omission of this item, and, as so modified, affirmed.

In No. 198, the government objects to the allowance of certain charges for transcript of record on writ of error in criminal proceedings, by order of court, on behalf of an indigent defendant; for services in connection with affidavits of poverty; and for issuing subpœnas for grand and petit jurors. As to the transcript, the contention is that section 878 of the Revised Statutes, providing for payment under order of court of fees and costs when defendant under indictment is without means, is exclusive, and does not cover the charge for this service. Here, again, we think the question has been settled, in effect, by what was said in *United States* v. *Barber*, 140 U. S. 164; *United States* v. *Van Duzee*, *supra*; and *United States* v. *Allred*, *supra*. It was held that an order of the court requiring a service to be performed was sufficient authority as between the clerk and the Government for the performance of the service and the allowance of the proper fee therefor.

Section 878 was originally enacted in 1846, and should not be held to operate as a prohibition to the extent contended. The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation.

The same considerations dispose of the objection to the second item as to affidavits of defendants in criminal cases of inability to pay costs. And we agree with the Court of Claims in sustaining the charges for issuing subpœnas for grand and petit jurors by order of court, the charge for seals being rejected. The subject is well treated in *Martin* v. *United States*, 26 Ct. Cl. 160. The judgment will be affirmed.

In No. 199, counsel for United States assign error in the allowance of charges (1) for administering oaths, by order of court, to witnesses for defendants on trial in criminal cases; (2) for administering oaths to affidavits of poverty and affixing jurats; (3) for filing and entering applications for process; (4) for filing and entering motions of indigent defendants for new trial; (5) and for services rendered an indigent defendant, by order of court, in prosecution of a writ of error in a capital case. We assume that all these items relate to indigent defendants, and considering sections 828 and 878 of the Revised Statutes, the act of February 6, 1889, (25 Stat. 655, c. 113,) our previous decisions, and what has just been said, we perceive no reason for declining to accept the conclusions of the Court of Claims.

No. 525 is a cross appeal from the judgment brought up in No. 199. We hold that the cross appeal lies in the circumstances, but agree with the disallowance by the Court of Claims of the items involved. Two of these items consisted of charges for certificates to copies of *sci. fa.*, and to copies of orders of court for furnishing meals to jurors. No direction of court as to such certificates was shown. The other item was for administering oaths on the *voir dire* of grand and petit jurors, and we do not think can be justified under the fourth clause of section 828. The judgment will be affirmed.

Judgments will be entered as above indicated.

True copy.

Test:

Clerk Supreme Court, U. S.